

SUPREME COURT OF INDIA

CIVIL WRIT PETITION 829 / 2013

IN THE MATTER OF:

S.G. VOMBATKERE & ANR.

...PETITIONERS

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

COMPILATION

VOLUME III - B

INDIAN CASE - LAWS

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Submitted on behalf of the Petitioners

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(BEFORE R.C. LAHOTI, C.J. AND ASHOK BHAN, J.)

DISTRICT REGISTRAR AND COLLECTOR,
HYDERABAD AND ANOTHER

Appellants;

Versus

CANARA BANK AND OTHERS

Respondents.

Civil Appeals Nos. 6350-74 of 1997[†] with No. 7079 of 2004[‡],
decided on November 1, 2004

A. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to
privacy of the person — Held, exists apart from right to privacy with
respect to places such as the home

B. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to
privacy of the person — Right to freedom from unreasonable search and
seizure — Scope — Confidentiality of bank documents, telephone calls and
correspondence — Held, State cannot have unrestricted access to inspect
and seize or make roving inquiries into all bank records relating to a person,
without any reliable information before it prior to such inspection —
Documents or copies of documents of the customer which are in the bank
must continue to remain confidential vis-à-vis the person, even if they are no
longer at the customer's house and have been voluntarily sent to a bank —
Search, taking of notes or extracts or seizure of the said documents would
amount to a breach of confidentiality and be violative of privacy rights of
customers of the bank, unless there is some probable or reasonable cause or
basis, to be recorded in writing, or materials before the authority making or
authorising the search, taking of notes or extracts or seizure — However,
cautioned that various provisions in the Income Tax Act, 1961 (S. 132, etc.)
or CrPC (Ss. 91, 165 & 166) which authorised search and seizure were not
ipso facto being invalidated herein; in any case said provisions had been
extensively considered by the courts and had been held to be valid —
Banker and Customer — Confidentiality in respect of banking transactions
— Nature of banker and customer relationship — Stamp Act, 1899 — S. 73
(as amended by A.P. Act 17 of 1986) — Constitutionality

C. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to
privacy — Scope — Held, in case of a matter being part of public records,
including court records, the right of privacy cannot be claimed

D. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to
privacy of the house and person — Right to freedom from unreasonable
search and seizure — Stamp Act, 1899 — S. 73 (as amended by A.P. Act 17
of 1986) — Constitutionality of — Said section permits inspection of
documents which are in private custody, empowers invasion of the home
without any safeguards as to probable or reasonable cause or requirement
of reasonable basis or materials, or recording of reasons for the belief
necessitating the search or seizure — Power of impounding documents can
be exercised under said section without giving notice or a chance to make

[†] From the Judgment and Order dated 27-9-1996 of the Andhra Pradesh High Court in WPs Nos.
10300 of 1989, 14320, 14924, 15456, 16595, 17724, 4948, 5330 and 5373 of 1988, 366, 4475
and 13347 of 1989, 1157 of 1991, 16733 and 18632 of 1993, 21872, 29007 and 29052 of 1995,
1670, 3165, 3242, 6370, 6533, 6782 and 6783 of 1996

[‡] Arising out of SLP (C) No. 11607 of 2001 : (1997) 4 Andh LT 118

a good the deficit stamp duty, except in case of documents in custody of a bank (no reasons having been given for making the distinction), and the power to adjudicate upon need for impounding documents in all cases vested in the person authorised — Moreover, due to the lack of safeguards, the possibility of an exercise of the said powers proving to be absolutely disproportionate to the purpose sought to be achieved cannot be ruled out — Therefore, held, said section violates the right to privacy both of the house and the person and is unconstitutional

b [Ed.: See also Art. 19(1)(a), '(c)(2)(vii) 8. Other constituents of Art. 19(1)(a) — Privacy, Right to', pp. 111 et seq., '(c)(2)(vii) 9. Subjective and psychological content of Art. 19(1)(a)', p. 113, and Art. 21, '(c)(3) Privacy, Right to', pp. 635 et seq., and see also under Art. 21, '(d)(2) "Personal liberty" — Meaning and scope — Particular Instances and Statutes', pp. 763 et seq. in Vol. 6, *Complete Digest of Supreme Court Cases*, 2nd Edn.]

c E. Constitution of India — Art. 14 — Discretionary power — Particular instances — If said power guided and controlled in Stamp Act, 1899, S. 73 (as amended by A.P. Act 17 of 1986) — Constitutionality — Held, said S. 73 suffers from the vice of excessive delegation, since (i) there are no guidelines as to the persons who may be authorised by the Collector, and (ii) there is no requirement of reasons being recorded by the Collector or the person authorised, for his belief necessitating search, and (iii) the power of impounding documents can be exercised without giving notice or a chance to make good the deficit stamp duty, except in case of documents in custody of a bank (no reasons having been given for making the distinction), and the power to adjudicate upon need for impounding documents in all cases being vested in the person authorised

d F. Constitution of India — Art. 14 — Discretionary power — Valid delegation of — Test and requirements — Held, guidelines or principles or norms for exercise of discretionary power, essential

e [Ed.: See also Art. 14, '(d)(2)(vi) Valid delegation of discretionary power - Test and requirements of' and '(d)(2)(iv) Necessarily discriminatory, discretionary power if' in *Complete Digest of Supreme Court Cases*, Vol. 5, pp. 32 et seq.]

Amended S. 73 of the Stamp Act — Infirmities

f A discretionary power may not necessarily be a discriminatory power but where a statute confers a power on an authority to decide matters of moment without laying down any guidelines or principles or norms, the power has to be struck down as being violative of Article 14. (Para 57)

Air India v. Nergesh Meerza, (1981) 4 SCC 335 : 1981 SCC (L&S) 599, *relied on*

g A bare reading of Section 73 as substituted by A.P. Act 17 of 1986 indicates the infirmities with which the provision suffers. The provision empowers "any person" authorised in writing by the Collector to have access to documents in private custody or custody of a public officer without regard to the fact whether the documents are sought to be used before any authority competent to receive evidence or whether such document would ever be voluntarily produced or brought before a public officer during the performance of any of his specified functions in his capacity as such (contrary to the scheme of the rest of the Stamp Act, 1899 even as applicable to the State of Andhra Pradesh). The power is capable of being exercised by such persons at all reasonable times and it is not preceded by any requirement of reasons being recorded by the Collector or the person authorised, for his belief necessitating search. The provision suffers from the vice of excessive delegation as there are no guidelines in the Act as to the

persons who may be authorised. The State must clearly define the officers by designation or state that the power can be delegated to officers not below a particular rank in the official hierarchy, as may be designated by the State. The person authorised has been vested with authority to impound the document. It is only in case of documents in custody of any bank that an exception has been carved out for giving a 30 days' previous notice to the bank to make good the deficit stamp duty before seizing and impounding the document. Not only is there no valid reason — none pointed out either in the pleadings or at the hearing — for drawing the distinction between a bank and other public office or any person having custody of document, even in the case of a bank, the power to adjudicate upon the need for impounding the document has been vested in the person authorised. (Paras 16, 12, 54, 46, 58, 3 and 43)

The A.P. Amendment permits inspection being carried out by the Collector by having access to the documents which are in *private custody* i.e. custody other than that of a public officer. It is clear that this provision empowers invasion of the home of the person in whose possession the documents "lending" to or leading to the various facts stated in Section 73 are in existence. Section 73 being one without any safeguards as to probable or reasonable cause or reasonable basis or materials violates the right to privacy both of the house and of the person. Under the garb of the power conferred by Section 73 the person authorised may go on a rampage searching house after house i.e. residences of the persons or the places used for the custody of documents. The possibility of any wild exercise of such power may be remote, but then on the framing of Section 73 the possibility cannot be ruled out. Any number of documents may be inspected, may be seized and may be removed and at the end the whole exercise may turn out to be an exercise in futility. The exercise may prove to be absolutely disproportionate to the purpose sought to be achieved and, therefore, a reasonable nexus between stringency of the provision and the purpose sought to be achieved ceases to exist. This deficiency pointed out by the High Court and highlighted by the respondents in the Supreme Court has not been removed even by the rules framed therefor. (Paras 55, 58, 59, 54 and 16)

It cannot be denied that there is an element of confidentiality between a bank and its customers in relation to the latter's banking transactions. However, in the case of a matter being part of public records, including court records, the right of privacy cannot be claimed. Our cheques are not merely negotiable instruments but yet the world can learn a vast amount about us by knowing how and with whom we have spent our money. Same is the position when we use the telephone or post a letter. The State cannot have unrestricted access to inspect and seize or make roving inquiries into all bank records, without any reliable information before it prior to such inspection. Once it is accepted that the right to privacy deals with persons, the documents or copies of documents of the customer which are in a bank, must continue to remain confidential vis-à-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank. Therefore, unless there is some probable or reasonable cause or basis, to be recorded in writing, or material before the Collector for reaching an opinion that the documents in the possession of the bank tend to secure any stamp duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or the taking of notes or extracts cannot be valid. The above safeguards must necessarily be read into the provision relating to search, inspection and seizure so as to save it from any unconstitutionality. When public records in the Sub-Registrar's Office or a bank or for that matter any other public

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a office are inspected for the purposes referred to in the impugned Section 73, the public officer may indeed have no objection to such inspection. But, as in the present case, in the context of a bank, which either holds the private documents of its customers or copies of such private documents, the disclosure of the contents of the documents by the bank would amount to a breach of confidentiality and would, therefore, be violative of privacy rights of its customers. (Paras 53, 54, 45, 46 and 48; and 18 to 40)

b However, it is not being said that any law which is not on the lines of the US Right to Financial Privacy Act, 1978 (Pub L. No. 95-630) is invalid. Indian laws such as Section 132, etc. of the Income Tax Act, 1961; or Sections 91, 165 and 166 of the Criminal Procedure Code, 1973 as to search and seizure have been extensively considered by the courts in India and have been held to be valid.

(Para 48)

c *Kharak Singh v. State of U.P.*, (1964) 1 SCR 332 : (1963) 2 Cri LJ 329; *Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632; *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301; 'X' v. Hospital 'Z', (1998) 8 SCC 296; *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399; *Sharda v. Dharmpal*, (2003) 4 SCC 493; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, *relied on*

d *Semayne's case*, (1603) 5 Coke's Rep 91a : 77 ER 194 (KB); *Entick v. Carrington*, (1765) 19 Howells' State Trials 1029 : 95 ER 807 : 2 Wils KB 275; *Boyd v. United States*, 116 US 616 : 29 L. Ed 746 (1886); *Olmstead v. United States*, 277 US 438 : 72 L. Ed 944 (1928) (dissenting opinion of Brandeis, J.); *Griswold v. State of Connecticut*, 381 US 479 : 14 L. Ed 2d 510 (1965); *Warden v. Heyden*, 387 US 294 (1967); *Katz v. United States*, 389 US 347 : 19 L. Ed 2d 576 (1967); *Terry v. Ohio*, 392 US 1 (1968); *Thornburgh v. American College of O&G*, 476 US 747 (1986); *Whalen v. Roe*, 429 US 589 : 51 L. Ed 2d 64 (1977); *United States v. Orloff*, 413 US 139 (1973); *Stanley v. Georgia*, 394 US 557 : 22 L. Ed 2d 542 (1969), *discussed*

United States v. Miller, 425 US 435 (1976), *disapproved*

e Richard Alexander: "Privacy, Banking Records and Supreme Court: A Before and After Look at Miller", South West University L. Rev. (1978), Vol. 10 (pp. 13-33); Polyviou G. Polyviou: *Search and Seizure* (Duckworth, 1982), pp. 67 to 71; La Fave: *Search and Seizure* (1978); Jackson and Tushnet: (2001) *Comparative Constitutions* Law 404; Note: *Government Access to Bank Records*, (1974) 83 YALE LAW JOURNAL 1439; *A Bank Customer has no Reasonable Expectation of Privacy of Bank Records*; *US v. Miller*, 14 San Diego L. Rev. 414 (1977), *referred to*

f Section 73 of the Stamp Act as amended in its application to the State of Andhra Pradesh by Andhra Pradesh Act 17 of 1986 is therefore ultra vires the Constitution. (Para 60)

g G. Stamp Act, 1899 — S. 73 (as amended by A.P. Act 17 of 1986) and Ss. 33 to 35, 38, 43, 48 and 62 — Constitutionality of said S. 73 — Non-payment of duty — Penalties imposed for — Held, possessing a document not duly stamped is not by itself an offence — Penalties for non-payment of duty include not receiving a document not duly stamped in evidence, impounding of said document, recovery of duty and penalty, and criminal prosecution under S. 62 — Further held, availability of these provisions adequately protects the interest of revenue — Therefore, the sweeping powers of search and seizure provided under the amended S. 73, which due to the lack of any safeguards could in any case be exercised in a manner disproportionate to the purpose sought to be achieved, cannot be justified

h either on ground of being a penalty for non-payment of duty or protection of the interest of revenue — Constitution of India — Art. 14 — Discretionary

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power — Principle of proportionality — Power granted open to use but disproportionate to purpose to be achieved — Held, invalid

(Paras 58, 59 and 15)

[Ed.: See also Art. 14, '(d)(2)(xii) Discretionary power — Principle of proportionality', Vol. 5, pp. 57 et seq. and ADMINISTRATIVE LAW, '7. (31) Judicial review — Proportionality', Vol. 1, pp. 193 et seq., *Complete Digest of Supreme Court Cases*, 2nd Edn.]

H. Stamp Act, 1899 — Ss. 33, 34, 35 and 38 — Power to impound documents and to recover duty with or without penalty — Held, has to be construed strictly and would be sustained only when falling within the four corners and letter of the law — Criminal Procedure Code, 1973 — S. 104 — Passports Act, 1967 — S. 10 — Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy (Para 14)

I. Stamp Act, 1899 — S. 62 — Nature of offence and requirements for prosecution under — Held, a minor offence punishable with fine only and not cognizable, liable to be condoned by payment of duty and penalty on the document — No prosecution can be launched except in case of a criminal intention to evade the stamp law or in case of a fraud, that too after having given person liable to be proceeded against an opportunity of being heard

(Paras 15, 58 and 59)

J. Taxation — Generally — Taxing statutes — Nature of — Held, taxing statutes cannot be classed as (a) remedial statutes and (b) statutes which have come to be enacted on demand of permanent public policy — This is the case since taxing statutes operate to impose burdens upon the public

(Para 10)

K. Constitution of India — Part III — Generally — Pre-constitutional laws — Held, must conform to provisions of Part III — Stamp Act, 1899 — Constitutionality of (Para 44)

L. Stamp Act, 1899 — Generally — Nature of — Held, cannot be held to have been enacted solely for protection of revenue and for purpose of being enforced solely at the instance of revenue officials (Para 13)

M. Interpretation of Statutes — Particular statutes and provisions — Taxing statutes — Principles for interpretation of — Held, are strictly construed — There is no scope for equity or judiciousness if the letter of law is clear and unambiguous — However, benefit of any ambiguity or conflict in different provisions of such a statute shall go to the citizen — Stamp Act, 1899 — Interpretation of (Para 10)

N. Interpretation of Statutes — Particular statutes and provisions — Remedial statutes and statutes which have come to be enacted on demand of the permanent public policy — Held, generally receive a liberal interpretation (Para 10)

Dowlatram Harji v. Vitho Radhoji, ILR (1880) 5 Bom 188 (FB); *Jai Devi v. Gokal Chand*, (1906) 7 Punj LR 428 (FB); *Munshi Ram v. Hariam Singh*, AIR 1934 Lah 637 (1); *L. Puran Chand v. Emperor*, AIR 1942 Lah 257, approved

Surajmull Nagorenmull v. Triton Insurance Co. Ltd., AIR 1925 PC 83 : 52 LA 126, relied on

O. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy — Source of, nature and scope — Held, is the right to be let alone and has been implied in the articles listed — Every person has a right to safeguard the privacy of his own and includes the right to privacy of the person and the house — List of elements of the right to privacy enumerated by Mathew, J. in *Gobind case*, (1975) 2 SCC 148, para 24, is not exhaustive

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— Right to privacy in any event would necessarily have to go through a process of case-by-case development (Paras 39, 37 and 40)

- a P. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy — Illegitimate intrusions into — Test for — Relevance to right to freedom from unreasonable search and seizure — Held, exclusion from illegitimate intrusions into privacy depends on the nature of the right being asserted and the way in which it is brought into play — It is at this point that the context becomes crucial, to inform substantive judgment — Further held, said factors are quite relevant whenever there is invasion of the right to privacy by way of searches and seizures at the instance of the State

(Para 31)

- c Q. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy — Legitimate intrusions into by (1) legislative provisions, (2) administrative/executive orders, and (3) judicial orders — Tests for — Held, intrusions in case of (1) must be tested on touchstone of reasonableness as guaranteed by the Constitution and for that purpose the court can go into proportionality of intrusion vis-à-vis purpose sought to be achieved — Intrusions in case of (2) have to be reasonable having regard to facts and circumstances of the case, and can be reasonable only if it has a reasonable basis or reasonable materials to support it — Intrusions in case of (3) by issue of judicial warrants are permissible only if the court has sufficient reason to believe that the search or seizure is warranted, and court must keep in mind extent of search and seizure necessary for protection of the particular State interest — Warrantless searches, in the rare cases that they are permissible, must be conducted in good faith, intended to preserve evidence or to prevent sudden danger to person or property

(Paras 31, 34 and 39)

- e R. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to freedom from unreasonable search and seizure — Illegality and reasonableness of search or seizure — Relationship between — Warrantless searches — When permissible — Held, one does not necessarily imply the other, though it is often the case that one implies the other (Para 31)

[Ed.: See also Art. 19(1)(a), '(c)(2)(vii) 8. Other constituents of Art. 19(1)(a) — Privacy, Right to', pp. 111 et seq., and Art. 21, '(c)(3) Privacy, Right to', pp. 635 et seq., and see also under Art. 21, '(d)(2) "Personal liberty" — Meaning and scope — Particular instances and statutes', pp. 763 et seq. in Vol. 6, *Complete Digest of Supreme Court Cases*, 2nd Edn.]

- f S. Constitution of India — Arts. 21, 19 and 14 — Right to personal liberty and privacy — Scope — "Procedure established by law" — Meaning — Threefold test to be satisfied by any law interfering with personal liberty of a person — Role of test propounded by Art. 14 — Held, as the test propounded by Art. 14 pervades Art. 21 as well, the law and procedure authorising interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive — If procedure prescribed does not satisfy the requirement of Art. 14 it would be no procedure at all within the meaning of Art. 21

[Ed.: See also Art. 21, '(e)(3) Justiciability of "procedure established by law"', pp. 776 et seq. in Vol. 6, *Complete Digest of Supreme Court Cases*, 2nd Edn.]

- g T. Constitution of India — Arts. 21, 19 and 14 — Right to personal liberty — Scope — Held, said right also means life free from encroachments unsustainable in law

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U. Constitution of India — Arts. 21 and 19 — Expression “personal liberty” in Art. 21 — Scope — Protection under Art. 19 — Held, the expression “personal liberty” is of the widest amplitude and covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to status of distinct fundamental rights and given additional protection under Art. 19 (Paras 56 and 55)

[Ed.: See also Art. 21, ‘(d)(1) “Personal liberty” — Meaning and scope’, pp. 744 et seq. in Vol. 6, *Complete Digest of Supreme Court Cases*, 2nd Edn.]

Kharak Singh v. State of U.P., (1964) 1 SCR 332; (1963) 2 Cri LJ 329; *Gobind v. State of M.P.*, (1975) 2 SCC 148; 1975 SCC (Cri) 468; *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632; *People’s Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301; ‘X’ v. *Hospital ‘Z’*, (1998) 8 SCC 296; *People’s Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399; *Sharda v. Dharmpal*, (2003) 4 SCC 493; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, *relied on*

Olmstead v. United States, 277 US 438; 72 L. Ed 944 (1928) (dissenting opinion of Brandeis, J.); *Griswold v. State of Connecticut*, 381 US 479; 14 L. Ed 2d 510 (1965); *Munn v. Illinois*, 94 US 113; 24 L. Ed 77 (1877); *Wolf v. Colorado*, 338 US 25; 93 L. Ed 1782 (1949); *Jane Roe v. Henry Wade*, 410 US 113 (1973), *referred to*

M.P. Sharma v. Satish Chandra, 1954 SCR 1077; 1954 Cri LJ 865, *clarified and limited*

R. v. Jeffries, (1994) 1 NZLR 290 (CA); *Gobind v. State of M.P.*, (1975) 2 SCC 148; 1975 SCC (Cri) 468, *clarified*

Tribe, Lawrence H.: *American Constitutional Law* (1988), 2nd Edn., Ch. 15, pp. 1306-1307, *relied on*

V. Constitution of India — Arts. 19(1)(a) & (d) and 21 — Right to privacy — Right to freedom from unreasonable search and seizure — History of, in England, the US and India traced — Right to privacy of the home as a personal right distinct from a right to property in the US discussed (Paras 18, 24 and 33)

Semayne’s case, (1603) 5 Coke’s Rep 91a; 77 ER 194 (KB); *Entick v. Carrington*, (1765) 19 Howells’ State Trials 1029; 95 ER 807; 2 Wils KB 275; *Boyd v. United States*, 116 US 616; 29 L. Ed 746 (1886); *Olmstead v. United States*, 277 US 438; 72 L. Ed 944 (1928) (dissenting opinion of Brandeis, J.); *Griswold v. State of Connecticut*, 381 US 479; 14 L. Ed 2d 510 (1965); *Warden v. Heyden*, 387 US 294 (1967); *Katz v. United States*, 389 US 347; 19 L. Ed 2d 576 (1967); *Terry v. Ohio*, 392 US 1 (1968); *Thornburgh v. American College of O&G*, 476 US 747 (1986); *Whalen v. Roe*, 429 US 589; 51 L. Ed 2d 64 (1977); *United States v. Orito*, 413 US 139 (1973); *Stanley v. Georgia*, 394 US 557; 22 L. Ed 2d 542 (1969), *discussed*

Fourth Amendment to the US Constitution; Article 12, Universal Declaration of Human Rights (1948); Article 17, International Covenant of Civil and Political Rights; Article 8, European Convention on Human Rights; Canadian Charter of Rights and Freedoms; Section 21, New Zealand Bill of Rights; Amar, Akhil: *Constitution and Criminal Procedure, First Principles*, Yale University Press (1997), p. 183, fn 42; Fried: *Privacy* (1968), Yale Law Journal 475 (at p. 477); (1976) 64 Cal L. Rev. 1447; Tribe, Lawrence H.: *American Constitutional Law* (1988), 2nd Edn., Ch. 15, pp. 1391-92, 1400 and 1412, *referred to*

W. Stamp Act, 1899 — Ss. 73 and 33 — Scope of S. 73 — “Public officer having in his custody any registers, books, records, papers, documents or proceedings” — Nature of documents included under — Meaning of “public office” in S. 33 — Held, confined only to “public documents”, that is documents in custody of a public officer which would necessarily be either public documents or public records of private documents — Purpose for and circumstances in which inspection may be authorised (Paras 3 and 43)

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X. Stamp Act, 1899 — Ss. 31 and 33 — Nature of — Held, under either section the documents concerned should have been voluntarily produced — Production thereof cannot be compelled (Para 12)

a Appeals dismissed D-M/ATZ/30745/C

Advocates who appeared in this case :

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| | 1. (2003) 4 SCC 493, <i>Sharda v. Dharmpal</i> | 518d |
| | 2. (2003) 4 SCC 399, <i>People's Union for Civil Liberties v. Union of India</i> | 518d |
| | 3. (1998) 8 SCC 296, <i>'X' v. Hospital 'Z'</i> | 518d |
| | 4. (1997) 1 SCC 301, <i>People's Union for Civil Liberties v. Union of India</i> | 518d |
| c | 5. (1994) 6 SCC 632, <i>R. Rajagopal v. State of T.N.</i> | 518b-c, 524d |
| | 6. (1994) 1 NZLR 290 (CA), <i>R. v. Jeffries</i> | 514f-g |
| | 7. 476 US 747 (1986), <i>Thornburgh v. American College of O&G</i> | 514b |
| | 8. (1981) 4 SCC 335 : 1981 SCC (L&S) 599, <i>Air India v. Nergesh Meerza</i> | 524g-h |
| | 9. (1978) 1 SCC 248, <i>Maneka Gandhi v. Union of India</i> | 524d-e |
| | 10. 429 US 589 : 51 L. Ed 2d 64 (1977), <i>Whalen v. Roe</i> | 514b-c |
| d | 11. 425 US 435 (1976), <i>United States v. Miller</i> | 519d, 520d-e, 520f, 521c-d, 521d, 521e, 521f, 521f-g, 522a, 522a-b, 523f-g |
| | 12. (1975) 2 SCC 148 : 1975 SCC (Cri) 468, <i>Gobind v. State of M.P.</i> | 516g, 517e-f, 518b, 521c, 523f |
| | 13. 413 US 139 (1973), <i>United States v. Orito</i> | 515b |
| | 14. 410 US 113 (1973), <i>Jane Roe v. Henry Wade</i> | 517a-b |
| | 15. 394 US 557 : 22 L. Ed 2d 542 (1969), <i>Stanley v. Georgia</i> | 515c-d |
| e | 16. 392 US 1 (1968), <i>Terry v. Ohio</i> | 514a-b |
| | 17. 389 US 347 : 19 L. Ed 2d 576 (1967), <i>Katz v. United States</i> | 513g-h, 519g, 520b-c, 521e |
| | 18. 387 US 294 (1967), <i>Warden v. Heyden</i> | 513f |
| | 19. 381 US 479 : 14 L. Ed 2d 510 (1965), <i>Griswold v. State of Connecticut</i> | 513c-d, 517a, 521e |
| f | 20. (1964) 1 SCR 332 : (1963) 2 Cri LJ 329, <i>Kharak Singh v. State of U.P.</i> | 516d-e, 516g-h, 517g |
| | 21. 1954 SCR 1077 : 1954 Cri LJ 865, <i>M.P. Sharma v. Satish Chandra</i> | 516a |
| | 22. 338 US 25 : 93 L. Ed 1782 (1949), <i>Wolf v. Colorado</i> | 516f-g |
| | 23. AIR 1942 Lah 257, <i>L. Puran Chand v. Emperor</i> | 509g-h |
| | 24. AIR 1934 Lah 637 (1), <i>Munshi Ram v. Harnam Singh</i> | 509g |
| | 25. 277 US 438 : 72 L. Ed 944 (1928), <i>Olmstead v. United States</i> | 513a-b, 517c |
| g | 26. AIR 1925 PC 83 : 52 IA 126, <i>Surajmull Nagoremull v. Triton Insurance Co. Ltd.</i> | 509d-e |
| | 27. (1906) 7 Punj LR 428 (HB), <i>Jai Devi v. Gokal Chand</i> | 509f |
| | 28. 116 US 616 : 29 L. Ed 746 (1886), <i>Boyd v. United States</i> | 511d-e, 513a-b |
| | 29. ILR (1880) 5 Bom 188 (FB), <i>Dowlatram Harji v. Vitho Radhoji</i> | 508f-g |
| | 30. 94 US 113 : 24 L. Ed 77 (1877), <i>Munn v. Illinois</i> | 516d-e |
| | 31. (1765) 19 Howells' State Trials 1029 : 95 ER 807 : 2 Wils KB 275, <i>Entick v. Carrington</i> | 511c-d, 511e, 512g |
| h | 32. (1603) 5 Coke's Rep 91a : 77 ER 194 (KB), <i>Semayne's case</i> | 511a-b |

The Judgment of the Court was delivered by

R.C. LAHOTI, C.J.— Leave granted in SLP (C) No. 11607 of 2001.

2. Section 73 of the Indian Stamp Act, 1899 as incorporated by Andhra Pradesh Act 17 of 1986, by amending the Central Act in its application to the State, has been struck down by the High Court of Andhra Pradesh as ultra vires the provisions of the Indian Stamp Act as also of Article 14 of the Constitution. The District Registrar and Collector, Registration and Stamps Department, Hyderabad and the Assistant Registrar have come up in appeal by special leave.

Relevant statutory provisions under the Central Act

3. Section 73 of the Indian Stamp Act (before the insertion of the text under the impugned State legislation in its applicability to the State of Andhra Pradesh) reads as under:

"73. Every public officer having in his custody any registers, books, records, papers, documents or proceedings, the inspection whereof may tend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times permit any person authorised in writing by the Collector to inspect for such purpose the registers, books, papers, documents and proceedings, and to take such notes and extracts as he may deem necessary, without fee or charge."

The term "public officer" is not defined in Section 73 nor in the interpretation clause. However, the term "public office" is found to have been used in Section 33. Sub-section (3) of Section 33 provides as under:

"33. (3) For the purposes of this section, in cases of doubt,—

(a) the State Government may determine what offices shall be deemed to be public offices; and

(b) the State Government may determine who shall be deemed to be persons in charge of public offices."

The term "public officer having in his custody any registers, etc." as occurring in Section 73 can be defined by having regard to the expression "public office" as occurring in Section 33. The Central legislation including Section 73 took care to see that the power to inspect was confined only to documents in the custody of public officer which documents would necessarily be either public documents or public record of private documents. The purpose of inspection is clearly defined. It is permissible to have inspection carried out only in these circumstances: (i) when it may tend to secure any duty, or (ii) when it may tend to prove any fraud or omission in relation to any duty, and (iii) when it may tend to lead to the discovery of any fraud or omission in relation to any duty.

The State amendments (1986)

4. A.P. Act 17 of 1986 has amended the Indian Stamp Act, 1899 in its application to the State of Andhra Pradesh. The Act was reserved by the Government of A.P. on 24-4-1986 for the consideration and assent of the President and received such assent on 17-7-1986 which was published in the Andhra Pradesh Gazette for general information on 22-7-1986. Out of the

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several amendments made by A.P. Act 17 of 1986, the relevant one for our purpose is Section 73 as substituted in place of the original Section 73 of the Indian Stamp Act by Section 6 of A.P. Act 17 of 1986. The same is reproduced hereunder:

"6. For Section 73, of the principal Act, the following section shall be substituted, namely—

"73. (1) Every public officer or any person having in his custody any registers, books, records, papers, documents or proceedings, the inspection whereof may attend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times permit any person authorised in writing by the Collector to enter upon any premises and to inspect for such purposes the registers, books, records, papers, documents and proceedings, and to take such notes and extracts as he may deem necessary, without fee or charge and if necessary to seize them and impound the same under proper acknowledgement:

Provided that such seizure of any registers, books, records, papers, documents or other proceedings, in the custody of any bank be made only after a notice of thirty days to make good the deficit stamp duty is given.

Explanation.—For the purposes of this proviso 'bank' means a banking company as defined in Section 5 of the Banking Regulation Act, 1949 and includes the State Bank of India, constituted by the State Bank of India Act, 1955 a subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959, a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, a regional rural bank established under the Regional Rural Banks Act, 1976, the Industrial Development Bank of India established under the Industrial Development Bank of India Act, 1964, National Bank for Agriculture and Rural Development established under the National Bank for Agriculture and Rural Development Act, 1981, the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956. The Industrial Finance Corporation of India established under the Industrial Finance Corporation Act, 1948, and such other financial or banking institution owned, controlled or managed by a State Government or the Central Government, as may be notified in this behalf by the Government.

(2) Every person having in his custody or maintaining such registers, books, records, papers, documents or proceedings shall, when so required by the officer authorised under sub-section (1), produce them before such officer and at all reasonable times permit such officer to inspect them and take such notes and extracts as he may deem necessary.

(3) If, upon such inspection, the person so authorised is of opinion that any instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same from the person liable to pay the stamp duty; and in

case of default the amount of the duty shall be recovered as an arrear of land revenue." "

5. The Statement of Objects and Reasons states that the Government have been considering for quite some time the question of plugging the loopholes in the Indian Stamp Act, 1899 in its application to this State so as to arrest the leakage of stamp revenue and also to augment the stamp revenue in the State. The State of Andhra Pradesh in doing so was inspired by the amendments made in the State of Karnataka. As to Section 73 the SOR states:

"As per Section 73 of the said Act, the Collector or any person authorised by him shall inspect any public office and the public officer having in his custody any registers, books, records etc. shall permit him to take copies of extracts of those records. However, the inspecting officer cannot seize the defictly stamped documents and impound the same during inspection. On account of this loophole, the inspecting officers are not able to seize and impound the defictly stamped documents and collect the deficit stamp revenue. It has therefore been decided to empower the inspecting officers to enter any premises and seize the documents and impound them."

(For a detailed Statement of Objects and Reasons see the Andhra Pradesh Gazette, Extraordinary, Part IV-A dated 20-3-1986, pp. 9-11.)

The A.P. State Rules (1986)

6. In exercise of the powers conferred by Section 75 of the Indian Stamp Act, 1899 and of all other powers hereunto enabling and in supersession of the earlier rules the Governor of Andhra Pradesh framed rules for the collection of duties secured in the course of inspection under Section 73 of the Indian Stamp (Andhra Pradesh Amendment) Act, 1986 which rules came into force on the 16th day of August, 1986. The relevant part of the Rules is extracted and reproduced hereunder:

"1. In these rules unless the context otherwise requires—

(a) 'Act' means, the Indian Stamp (A.P. Amendment) Act, 1986.

(b) 'Inspector General of Registration and Stamps' includes the person authorised in writing by him as the Collector appointed under Section 73 of the Act to exercise the powers under that section.

(c) 'Head of Office' means, the head of the office inspected by the Inspector General of Registration and Stamps under Section 73.

(d) 'Section' means a section of the Act.

(e) 'Any premises' includes any public office or any place where registers, books, documents etc. are kept under the custody of a person the inspection whereof may tend to secure any duty.

2. (1) The notes of inspection under Section 73 shall be sent to the head of office with a copy to the head of the district office, if the office inspected is subordinate to him, or with a copy to the head of the department concerned, if the office inspected is the district or regional office.

(2) The first reports of compliance shall be sent to the Inspector General of Registration and Stamps, immediately on receipt of the notes of inspection by the head of office, with a copy to the head of the district office

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concerned, if the office inspected is subordinate to him or with a copy to the head of the department, if the office inspected is a district or regional office.

a 3. When deficitly stamped documents are detected during the course of inspection the following procedure shall be followed—

b (i) The Inspector General of Registration and Stamps or the person authorised by him shall seize and impound such documents and after giving an opportunity to the parties levy deficit duties if any, without penalty and collect the same from the persons liable to pay under sub-section (3) of Section 73 and add the following certificate on the original document—

* * *

c (ii) If the parties fail to pay the deficit duty under sub-rule (i), it shall be collected by the head of office. The amounts so collected shall be remitted to the Treasury under the following head of account by means of a challan.

* * *

d (iii) If the parties failed to pay such deficit duties, the Inspector General of Registration and Stamps shall forward the original document to the Collector exercising powers under Section 48 of the Indian Stamp Act, 1899 over the area for effecting recovery by coercive process. After the amounts are so collected, the procedure laid down in sub-rule (i) shall be followed.

(iv) In the absence of original documents, and on the basis of copies of such documents, if they are found to be not duly stamped, the procedure for collection of the duty as laid down in sub-rule (iii) shall be followed:

e 4. If the parties are aggrieved by the levy of duties they may apply to the Inspector General of Registration and Stamps for revision before the certificate prescribed under Rule 3 is added.

5.-6. * * *

(For full text of Rules see the Andhra Pradesh Gazette, Rules supplement to Part II, Extraordinary dated 14-8-1986, pp. 4-77.)

The challenge

f 7. There were 25 writ petitions filed in the High Court. Out of these, 11 were by different banks. A few writ petitions were filed by institutions, corporate or incorporate bodies and a few were filed by sugar companies. The grievances arose because the documents executed between private parties and received and retained in the custody of the bank in ordinary course of their loan-advancing transactions were inspected and then the banks were served with a request to remit the amount of deficit duty on the documents inspected and to recover the same from the parties concerned. The grievance of the sugar companies is that in the course of their business they were entering into agreements with the sugarcane-growers selling sugarcane to the sugar companies in compliance with the provisions of the A.P. Sugarcane Control Order, 1965 in the pro forma prescribed by the Control Order. Several agreements entered into in the prescribed pro forma were treated as unstamped (though they were not liable to be stamped, in the

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submission of sugar companies) and therefore, were sought to be impounded. The grievance of private persons is that the documents in their possession are sought to be inspected, impounded and levied with duty though they were not rendered in evidence nor produced before any public office. a

8. A perusal of the judgment of the High Court shows that in holding the impugned Section 73 of the Act ultra vires the Constitution and other provisions of the Indian Stamp Act, the High Court has arrived at four findings: firstly, that the amended Section 73 is inconsistent with the other provisions of the Act; secondly, that the provision is violative of the principles of natural justice; thirdly, the provision is arbitrary and unreasonable and hence violative of Article 14 of the Constitution; and fourthly, there are no guidelines provided for the exercise of power by the authorised persons under the amended Section 73 which is either arbitrary and unreasonable or vitiated on account of excessive delegation of statutory powers. b
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9. During the course of hearing Mrs K. Amarswari, the learned Senior Counsel for the appellants has vehemently attacked the correctness of the impugned judgment submitting that the A.P. Amendments are directed towards safeguarding the revenue of the State and striking at the evil of stamp duty evasion, and therefore the validity of such reasonable legislation was not liable to be questioned as unconstitutional. On the other hand, the learned counsel appearing for the respondents have defended the judgment of the High Court by reiterating the same grounds of attack on the constitutional validity of the impugned amendment as were urged in the High Court; of course enlarging the reach of submissions by developing the dimensions thereof. We will deal with the submissions so made before us. d
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Nature of stamp legislation

10. The Stamp Act is a piece of fiscal legislation. Remedial statutes and statutes which have come to be enacted on demand of the permanent public policy generally receive a liberal interpretation. However, fiscal statutes cannot be classed as such, operating as they do to impose burdens upon the public and are, therefore, construed strictly. A few principles are well settled while interpreting a fiscal law. There is no scope for equity or judiciousness if the letter of law is clear and unambiguous. The benefit of any ambiguity or conflict in different provisions of statute shall go to the subject. In *Dowlatram Harji v. Vittho Radhoji*¹ the Full Bench indicated the need for balancing the harshness which would be inflicted on the subjects by implementation of the stamp law as against the advantage which would result in the form of revenue to the State; the latter may not be able to compensate the discontent which would be occasioned amongst the subjects. f
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11. The legislative competence of the State of Andhra Pradesh to amend and modify the Indian Stamp Act, a Central legislation, in its applicability to the State of Andhra Pradesh, has not been questioned and rightly so in view of the State enactment having been reserved for the consideration of the h

¹ ILR (1880) 5 Bom 188 (F.B)

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a President and having received his assent under Article 254(2) of the Constitution. The attack is on the ground of unreasonableness, inconsistency and excessive delegation of powers and also on account of drastic powers having been conferred on executive authorities without laying down guidelines.

b 12. The provisions of Section 29 providing for the persons by whom duties are payable have been left untouched. So is with Section 31 dealing with "adjudication as to proper stamp" which confers power on the Collector to adjudicate upon the duty with which a document shall be chargeable, though such document may or may not have been executed. The scheme of Section 31 involves an element of voluntariness. The person seeking adjudication must have brought the document to the Collector and also applied for such adjudication. The document cannot be compelled to be brought before him by the Collector. Section 33 confers power of c impounding a document not duly stamped subject to the document being produced before an authority competent to receive evidence or a person in charge of a public office. It is necessary that the document must have been produced or come before such authority or person in charge in performance of its functions. The document should have been voluntarily produced. At the same time, Section 36 imposes an embargo on the power to impound vesting d in the authority competent to receive evidence, by providing that it cannot question the admission of document in evidence once it has been admitted. None of these provisions have been amended by the State of Andhra Pradesh.

e 13. In *Surajmull Nagoremull v. Triton Insurance Co. Ltd.*² Their Lordships of the Privy Council made it clear that the provisions of the Stamp Act cannot be held to have been framed solely for the protection of revenue and for the purpose of being enforced solely at the instance of the revenue officials.

14. Power to impound a document and to recover duty with or without penalty thereon has to be construed strictly and would be sustained only when falling within the four corners and letter of the law. This has been the consistent view of the courts. Illustratively, three decisions may be referred. f In *Jai Devi v. Gokal Chand*³ a document not duly stamped was produced in the court by the plaintiff along with the plaint but the suit came to be dismissed for non-prosecution. It was held by the Full Bench that the document annexed with the plaint cannot be said to have been produced in the court in evidence and the court had no jurisdiction to call for the same and impound it. In *Munshi Ram v. Harnam Singh*⁴ the suit was compromised g on the date of first hearing and decree was passed based on the compromise. The original entry in a *bahi* was not put in evidence and, therefore, the Special Bench held it was not liable to be impounded. In *L. Puran Chand v. Emperor*⁵ the power to impound was sought to be exercised after the decision

2 AIR 1925 PC 83 : 52 IA 126

h 3 (1906) 7 Pwaj LR 428 (FB)

4 AIR 1934 Lah 637 (1)

5 AIR 1942 Lah 257

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in the suit and when the document alleged to be not duly stamped had already been directed to be returned as not proved though it was not physically returned. The Special Bench held that the document was not available for being impounded. a

15. Though an instrument not duly stamped may attract criminal prosecution under Section 62 of the Act but Parliament and the legislature have both treated it to be a minor offence punishable with fine only and not cognizable. Here again it is well settled that such offence is liable to be condoned by payment of duty and penalty on the document and no prosecution can be launched except in the case of a criminal intention to evade the stamp law or in case of a fraud and that too after giving the person liable to be proceeded against, an opportunity of being heard. b

16. A bare reading of Section 73 as substituted by A.P. Act 17 of 1986 indicates the infirmities with which the provision suffers. The provision empowers any person authorised in writing by the Collector to have access to documents in private custody or custody of a public officer without regard to the fact whether the documents are sought to be used before any authority competent to receive evidence and without regard to the fact whether such document would ever be voluntarily produced or brought before a public officer during the performance of any of his specified functions in his capacity as such. The power is capable of being exercised by such persons at all reasonable times and it is not preceded by any requirement of the reasons being recorded by the Collector or the person authorised for his belief necessitating search. The person authorised has been vested with authority to impound the document. It is only in case of documents in custody of any bank that an exception has been carved out for giving a 30 days' previous notice to the bank to make good the deficit stamp duty before seizing and impounding the document. Not only is there no valid reason — none pointed out either in the pleadings nor at the hearing — for drawing the distinction between a bank and other public office or any person having custody of document, even in the case of a bank, the power to adjudicate upon the need for impounding the document has been vested in the person authorised. The provision does not lay down any guidelines for determining the person who can be authorised by the Collector to exercise the powers conferred by Section 73. c d e f

17. It is submitted on behalf of the respondents (writ petitioners in the High Court) that the impugned Section 73 (as applicable in Andhra Pradesh) interferes with the personal liberty of citizens inasmuch as it allows an intrusion into the privacy and property of the citizens. The instruments may have been kept in the residential accommodation of a person or may have been kept at a place belonging to the person and meant for the custody of the documents and both such places can be entered into by any person authorised in writing by the Collector. It was submitted that the provision is unreasonable and cannot be sustained on the constitutional anvil. g h

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Right of privacy qua search and seizure — debate in other countries

18. The right to privacy and the power of the State to "search and seize" have been the subject of debate in almost every democratic country where fundamental freedoms are guaranteed. History takes us back to *Semayne's case*⁶ decided in 1603 where it was laid down that "Every man's house is his castle." One of the most forceful expressions of the above maxim was that of William Pitt in the British Parliament in 1763. He said: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter, the rain may enter — *but the King of England cannot enter* — all his force dare not cross the threshold of the ruined tenement."

19. When John Wilkes attacked not only governmental policies but the King himself, pursuant to general warrants, State officers raided many homes and other places connected with John Wilkes to locate his controversial pamphlets. Entick, an associate of Wilkes, sued the State officers because agents had forcibly broken into his house, broke locked desks and boxes, and seized many printed charts, pamphlets and the like. In a landmark judgment in *Entick v. Carrington*⁷ Lord Camden declared the warrant and the behaviour as subversive "of all the comforts of society" and the issuance of a warrant for the seizure of *all* of a person's *papers* and not those only alleged to be criminal in nature was "contrary to the genius of the law of England". Besides its general character, the warrant was, according to the Court, bad inasmuch as it was not issued on a showing of *probable cause* and no record was required to be made of what had been seized. In USA, in *Boyd v. United States*⁸, US at p. 626, the US Supreme Court said that the great *Entick*⁷ judgment was "one of the landmarks of English liberty. ... one of the permanent monuments of the British Constitution".

20. The Fourth Amendment in the US Constitution was drafted after a long debate on the English experience and secured freedom from unreasonable searches and seizures. It said:

- "The right of the people to be secure in their person, houses, *papers*, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon *probable cause*, supported by oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*"

Article 12 of the Universal Declaration of Human Rights (1948) refers to privacy and it states:

- "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

⁶ (1603) 5 Coke's Rep 91a : 77 ER 194 (KB)
⁷ (1765) 19 Howells' State Trials 1029 : 95 ER 807 : 2 Wils KB 275
⁸ 116 US 616 : 29 L. Ed 746 (1886)

Article 17 of the International Covenant of Civil and Political Rights (to which India is a party), refers to privacy and states that:

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation." a

21. The European Convention on Human Rights, which came into effect on 3-9-1953, also states in Article 8:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence." b

2. There shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others." c

22. The Canadian Charter of Rights and Freedoms declares:

"Everyone has the right to be secure against unreasonable search and seizure." d

23. The New Zealand Bill of Rights declares in Section 21 that "everyone has the right to be secure against unreasonable search or seizure, whether of the person, property or correspondence or otherwise". e

24. Though the US Constitution contains a specific provision in the Fourth Amendment against "unreasonable search and seizure", it does not contain any express provision protecting the "right to privacy". However, the US Supreme Court has culled out the "right of privacy" from the other rights guaranteed in the US Constitution. In India, our Constitution does not contain a specific provision either as to "privacy" or even as to "unreasonable" search and seizure, but the right to privacy has, as we shall presently show, been spelt out by our Supreme Court from the provisions of Article 19(1)(a) dealing with freedom of speech and expression, Article 19(1)(d) dealing with right to freedom of movement and from Article 21 which deals with right to life and liberty. We shall first refer to the case-law in US relating to the development of the right of privacy as these cases have been adverted to in the decisions of this Court. f

Privacy right in US initially concerned "property"

25. The American courts trace the "right to privacy" to the English common law which treated it as a right associated with "right to property". It was declared in *Entick v. Carrington*⁷ (1765) that the right of privacy protected trespass against property. Lord Camden observed: g

"The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole.... By the laws of England, every invasion of private property, be it even so minute, is a trespass. No man can set h

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foot upon my ground without my licence but he is liable to an action though the damage be nothing.”

- a This aspect of privacy as a property right was accepted by the US Supreme Court in *Boyd v. United States*⁸, US at p. 627 and other cases.

From right to property to right to person

- b 26. After four decades, in *Olmstead v. United States*⁹, which was a case of wire-tapping or electronic surveillance and where there was no actual physical invasion, the majority held that the action was *not* subject to Fourth Amendment restrictions. But, in his dissent, Justice Brandeis stated that the amendment protected the right to privacy which meant “the right to be let alone”, and its purpose was “to secure conditions favourable to the pursuit of happiness”, while recognising “the significance of man’s spiritual nature, of his feelings and of his intellect”; the right sought “to protect Americans in their beliefs, their thoughts, their emotions and their sensations” (US p. 478).
- c The dissent came to be accepted as the law after another four decades.

- d 27. When the right to personal privacy came up for consideration in *Griswold v. State of Connecticut*¹⁰, in the absence of a specific provision in the US Constitution, the Court traced the right to privacy as an emanation from the right to freedom of expression and other rights. In that case, Douglas, J. observed that the right to freedom of speech and press included not only the right to utter or to print, but also the right to distribute, the right to receive, and the right to read and that without these *peripheral rights*, the specific right would be less secure and that likewise, the other specific guarantees in the Bill of Rights have *penumbras*, forced by emanations from those guarantees which help give them life and substance. It was held that the various guarantees created *zones of privacy* and that protection against all government invasions “of the sanctity of man’s house and the privacies of life” was fundamental. The learned Judge stated (US p. 494) that “privacy is a fundamental *personal right*, emanating ‘from the totality of the constitutional scheme under which we (Americans) live’”.
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- f 28. The shift from property to person was clearly declared in *Warden v. Heyden*¹¹, US at p. 304 as follows:

“... the premise that property interests control the right of the Government to search and seize has been discredited.... We have recognised that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.”

- g ***Katz and “reasonable expectation of privacy”***

29. Thereafter, in *Katz v. United States*¹² there was a clearer enunciation when the majority laid down that the Fourth Amendment protected “*people*

9 277 US 438 : 72 L Ed 944 (1928)

h 10 381 US 479 : 14 L Ed 2d 510 (1965)

11 387 US 294 (1967)

12 389 US 347 : 19 L Ed 2d 576 (1967)

and not places". Harlan, J. in his concurring opinion said, — in a passage which has been held to be the distillation of the majority opinion — that the Fourth Amendment scrutiny would be triggered whenever official investigative activity invaded "a reasonable expectation of privacy". Although the phrase came from Justice Harlan's separate opinion, it is treated today as the essence of the majority opinion (*Terry v. Ohio*¹³). [See *Constitution and Criminal Procedure, First Principles* by Prof. Akhil Amar, Yale University Press (1997), p. 183, fn 42.]

30. Stevens, J. in *Thornburgh v. American College of O&G*¹⁴ observed that "the concept of privacy embodies the moral fact that a person belongs to himself and not to others nor to society as a whole". The same learned Judge had said earlier in *Whalen v. Roe*¹⁵ (US pp. 599-600) that the right embraces both a general "individual interest in avoiding disclosure of personal matters" (emphasis supplied) and a similarly general, — but nonetheless distinct — "interest in independence in making certain kinds of important decisions". Fried says in *Privacy* (1968), Yale Law Journal 475 (at p. 477) that physical privacy is as necessary to "relations of the most fundamental sort ... respect, love, friendship and trust" as "oxygen is for combustion". A commentator in (1976) 64 Cal L. Rev. 1447 says that privacy centres round values of repose, sanctuary and intimate decision. Repose refers to freedom from unwanted stimuli; sanctuary to protection against intrusive observation; and intimate decision, to autonomy with respect to the most personal of life's choices. [Prof. Lawrence H. Tribe's treatise, *American Constitutional Law* (1988), 2nd Edn., Ch. 15.]

31. Prof. Tribe says (*ibid.*, p. 1306) that to make sense for constitutional law out of the smorgasbord of philosophy, sociology, religion and history upon which our understanding of humanity subsists, we must turn from absolute propositions and dichotomies so as to place each allegedly protected act and each illegitimate intrusion, in a social context related to the Constitution's text and structure. He says (p. 1307) that "exclusion of illegitimate intrusions into privacy depends on the nature of the right being asserted and the way in which it is brought into play; it is at this point that context becomes crucial — to inform substantive judgment". If these factors are relevant for defining the right to privacy, they are quite relevant — whenever there is invasion of that right by way of searches and seizures at the instance of the State. In New Zealand, in the watershed case of *R. v. Jeffries*¹⁶ Robertson, J. stated that the reasonableness of a search and seizure would depend upon the subject-matter and the unique combination of "time, place and circumstances". The Court made a distinction between illegality and reasonableness of the search or seizure, in the context of Section 21 of the NZ Bill of Rights, 1990. It said "a search may be legal but unreasonable; it

¹³ 392 US 1 (1968)

¹⁴ 476 US 747 (1986)

¹⁵ 429 US 589 : 51 L. Ed 2d 64 (1977)

¹⁶ (1994) 1 NZL.R 290 (CA)

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may be illegal but reasonable". Probably, what was meant was that a search under a court warrant may be lawful but the manner in which it is executed
a may be unreasonable. Likewise, there may be very rare exceptions where a search and seizure operation is conducted without a warrant on account of a sense of grave urgency for preventing danger to life or property or where delay in procuring a warrant may indeed result in the evidence vanishing but still the search or seizure might have been conducted in a reasonable manner.

32. As to privacy of the home, the same has been elaborated. Chief Justice Burger stated in *United States v. Orin*¹⁷ that the Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, childbearing and education. Prof. Tribe states (p. 1412) that indeed, privacy of the home has the longest constitutional pedigree of the lot, "for the sanctity of the home ... has been embedded in our traditions since the origins
c of the Republic"; when we retreat across the threshold of the home, inside, the Government must provide escalating justification if it wishes to follow, monitor or control us there. In *Stanley v. Georgia*¹⁸ it was declared that however free the State may be to ban the public dissemination of constitutionally unprotected obscene materials, the State cannot criminalise
d the purely private possession of such material at home — "[A] State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." (US p. 565)

33. The above discussion shows that in the United States principles regarding protection of privacy of the home have been put on strong basis and the right is treated as a personal right distinct from a right to property.
e The right is, however, not absolute though any intrusion into the right must be based upon probable cause as stated in the Fourth Amendment.

34. Intrusion into privacy may be by — (1) legislative provisions, (2) administrative/executive orders, and (3) judicial orders. The legislative intrusions must be tested on the touchstone of reasonableness as guaranteed
f by the Constitution and for that purpose the court can go into the proportionality of the intrusion vis-à-vis the purpose sought to be achieved. (2) So far as administrative or executive action is concerned, it has again to be reasonable having regard to the facts and circumstances of the case. (3) As to judicial warrants, the court must have sufficient reason to believe that the search or seizure is warranted and it must keep in mind the extent of search
g or seizure necessary for the protection of the particular State interest. In addition, as stated earlier, common-law-recognised rare exceptions such as where warrantless searches could be conducted but these must be in good faith, intended to preserve evidence or intended to prevent sudden danger to person or property.

h
¹⁷ 413 US 139 (1973)
¹⁸ 394 US 557 : 22 L. Ed 2d 542 (1969)

Development of law in India

35. The earliest case in India to deal with "privacy" and "search and seizure" was *M.P. Sharma v. Satish Chandra*¹⁹ in the context of Article 19(1)(f) and Article 20(3) of the Constitution. The contention that search and seizure violated Article 19(1)(f) was rejected, the Court holding that a mere search by itself did not affect any right to property, and though seizure affected it, such effect was only temporary and was a reasonable restriction on the right. The question whether search warrants for the seizure of documents from the accused were unconstitutional was not gone into. The Court, after referring to the American authorities, observed that in the US, because of the language in the Fourth Amendment, there was a distinction between legal and illegal searches and seizures and that such a distinction need not be imported into our Constitution. The Court opined that a search warrant was addressed to an officer and not to the accused and did not violate Article 20(3). In the present discussion the case is of limited help. In fact, the law as to privacy was developed in later cases by spelling it out from the right to freedom of speech and expression in Article 19(1)(a) and the right to "life" in Article 21.

36. Two later cases decided by the Supreme Court of India where the foundations for the right were laid, concerned the intrusion into the home by the police under State regulations, by way of "domiciliary visits". Such visits could be conducted any time, night or day, to keep a tab on persons for finding out suspicious criminal activity, if any, on their part. The validity of these regulations came under challenge. In the first one, *Kharak Singh v. State of U.P.*²⁰ the U.P. Regulations regarding domiciliary visits were in question and the majority referred to *Munn v. Illinois*²¹ and held that though our Constitution did not refer to the right to privacy expressly, still it can be traced from the right to "life" in Article 21. According to the majority, clause 236 of the relevant Regulations in U.P., was bad in law; it offended Article 21 inasmuch as there was no law permitting interference by such visits. The majority did not go into the question whether these visits violated the "right to privacy". But, Subba Rao, J. while concurring that the fundamental right to privacy was part of the right to liberty in Article 21, part of the right to freedom of speech and expression in Article 19(1)(a), and also of the right to movement in Article 19(1)(d), held that the Regulations permitting surveillance violated the fundamental right of privacy. In the discussion the learned Judge referred to *Wolf v. Colorado*²². In effect, all the seven learned Judges held that the "right to privacy" was part of the right to "life" in Article 21.

37. We now come to the second case, *Gobind v. State of M.P.*²³ in which Mathew, J. developed the law as to privacy from where it was left in *Kharak*

19 1954 SCR 1077 : 1954 Cri LJ 865

20 (1964) 1 SCR 332 : (1963) 2 Cri LJ 329

21 94 US 113 : 24 L. Ed 77 (1877)

22 338 US 25 : 93 L. Ed 1782 (1949)

23 (1975) 2 SCC 148 : 1975 SCC (Cri) 468

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- Singh*²⁰. The learned Judge referred to *Griswold v. Connecticut*¹⁰ where Douglas, J. referred to the theory of penumbras and peripheral rights and had stated that the right to privacy was implied in the right to free speech and could be gathered from the entirety of fundamental rights in the constitutional scheme, for, without it, these rights could not be enjoyed meaningfully. Mathew, J. also referred to *Jane Roe v. Henry Wade*²⁴ where it was pointed out (SCC p. 155, para 18) that though the right to privacy was not specifically referred to in the US Constitution, the right did exist and
- a "roots of that right may be found in the First, Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment".
- b Mathew, J. stated that, however, the "right to privacy was not absolute" and that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness as explained in *Olmstead v. United States*⁹, US at p. 471; the privacy right can be denied only when an "important countervailing interest is shown to be superior", or where a compelling State interest was shown. (Mathew, J. left open the issue whether moral interests could be relied upon by the State as compelling interests). Any right to privacy, the learned Judge said (see para 24), must encompass and protect the
- c personal intimacies of the home, the family, marriage, motherhood, procreation and child-bearing. This list was however not exhaustive. He explained (see para 25) that, if there was State intrusion there must be "a reasonable basis for intrusion". The right to privacy, in any event (see para 28), would necessarily have to go through a process of case-by-case development.
- d 38. Coming to the particular U.P. Regulations 855 and 856, in question in *Gobind*²³, Mathew, J. examined their validity (see para 30). These, according to him, gave large powers to the police and needed, therefore, to be read down, so as to be in harmony with the Constitution, if they had to be saved at all. "Our Founding Fathers were thoroughly opposed to a Police Raj!" he said. Therefore, the Court must draw boundaries upon these police powers so as to avoid breach of constitutional freedoms. While it could not be said that all domiciliary visits were *unreasonable* (see para 31), still while interpreting them, one had to keep the character and antecedents of the person who was under watch as also the objects and limitations under which the surveillance could be made. The right to privacy could be restricted on the basis of
- e *compelling public interest*. The learned Judge noticed that unlike non-statutory regulations in *Kharak Singh*²⁰, here Regulation 856 was "law" (being a piece of subordinate legislation) and hence it could not be said in this case that Article 21 was violated for lack of legislative sanction. The law was very much there in the form of these Regulations. Regulations 853(1) and 857 prescribed a procedure that was "reasonable". So far as Regulation 856 was concerned, it only imposed reasonable restrictions within Article
- f 19(5) and there was, even otherwise, a compelling State interest. Regulations
- g
- h

853(1) and 857 referred to a class of persons who were *suspected* as being habitual criminals, while Regulation 857 classified persons who could reasonably be held to have criminal tendencies. Further Regulation 855 empowered surveillance only of persons against whom *reasonable materials* existed for the purpose of inducing an opinion that they show a determination to lead a life of crime. The Court thus read down the Regulations and upheld them for the above reasons. a

39. We have referred in detail to the reasons given by Mathew, J. in *Gobind*²⁵ to show that, the right to privacy has been implied in Articles 19(1)(a) and (d) and Article 21; that, the right is not absolute and that any State intrusion can be a reasonable restriction only if it has *reasonable basis* or *reasonable materials* to support it. b

40. A two-Judge Bench in *R. Rajagopal v. State of T.N.*²⁶ held the right of privacy to be implicit in the right to life and liberty guaranteed to the citizens of India by Article 21. "It is the right to be let alone." Every citizen has a right to safeguard the privacy of his own. However, in the case of a matter being part of public records, including court records, the right of privacy cannot be claimed. The right to privacy has since been widely accepted as implied in our Constitution, in other cases, namely, *People's Union for Civil Liberties v. Union of India*²⁶, *'X' v. Hospital 'Z'*²⁷, *People's Union for Civil Liberties v. Union of India*²⁸ and *Sharda v. Dharmapal*²⁹. c

The impugned provision of the A.P. Amendment on anvil d

41. It is in the background of the above, the validity of Section 73 of the Stamp Act, 1899 falls to be decided.

42. The text of Section 73, Indian Stamp Act and the text as amended in its application to the State of A.P. have been set out in the earlier part of the judgment. e

43. It will be seen that under Section 73, the Collector could inspect the "registers, books, records, papers, documents or proceedings" in the public office. Obviously, this meant that the inspection must relate to "public documents" in the custody of the public officer or to public record of private documents available in his office. The inspection could be carried out only by a person authorised — in writing — by the Collector. The purpose of inspection has to be specific and has to be based upon a belief that (i) such inspection may tend to secure any (stamp) duty, or (ii) it may tend to prove any fraud or omission in relation to any duty, or (iii) it may tend to lead to the discovery of any fraud or omission in relation to any duty. f

44. The above provisions have remained in Section 73 even after the A.P. Amendment of 1986. The validity of the unamended provisions of Section 73 of the Stamp Act, 1899 is not in issue before us. It is a pre-constitutional law. It is obvious that in its operation after the commencement of the Constitution, g

25 (1994) 6 SCC 632

26 (1997) 1 SCC 301

27 (1998) 8 SCC 296

28 (2003) 4 SCC 399

29 (2003) 4 SCC 493 h

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even the unamended Section 73 must conform to the provisions of Part III of our Constitution.

- a 45. When public record in the Sub-Registrar's Office or a bank or for that matter any other public office is inspected for the purposes referred to in the impugned Section 73, the public officer may indeed have no objection to such inspection. But, as in the case before us, in the context of a bank which either holds the private documents of its customers or copies of such private documents, the question arises whether disclosure of the contents of the documents by the bank would amount to a breach of confidentiality and would, therefore, be violative of privacy rights of its customers?

Bank and its customers — confidentiality of relationship

- b 46. It cannot be denied that there is an element of confidentiality between a bank and its customers in relation to the latter's banking transactions. Can the State have unrestricted access to inspect and seize or make roving inquiries into all bank records, without any reliable information before it prior to such inspection? Further, can the Collector authorise "any person" whatsoever to make the inspection, and permit him to take notes or extracts? These questions arise even in relation to Section 73 and have to be decided in the context of privacy rights of customers.

- c 47. There has been a great debate in the US about privacy in respect of bank records and inspection thereof by the State. In *United States v. Miller*³⁰ the majority of the Court laid down that once a person passes on cheques, etc. to a bank, which indeed is in a position of a third party, the right to privacy of the document is no longer protected. In that case, the respondent, who had been charged with various federal offences, made a pre-trial motion to suppress microfilms of cheques, deposit slips and other records relating to his accounts with two banks, which maintained records relating to the (US) Bank Secrecy Act, 1970. He contended that the *subpoenas duces tecum* pursuant to which the material had been produced by the banks, were defective and that the records had thus been illegally seized in violation of the Fourth Amendment. The request was denied by the trial court, the respondent was tried and convicted. The Court of Appeals reversed the conviction, holding that the subpoenaed documents fell within the constitutionally protected zone of privacy. On further appeal, the US Supreme Court restored the conviction holding that, once the documents reached the hands of a third party, namely, the bank, the respondent ceased to possess any Fourth Amendment interest in the bank records that could be vindicated by a challenge to the subpoenas, that the materials were *business records of the banks and not the respondent's private papers*; that, there was no legitimate "expectation of privacy" (as stated in *Katz*¹²) in the contents of the original cheques and deposit slips, since the cheques were "not confidential communications" but negotiable instruments to be used in commercial transactions and the documents contained only information voluntarily conveyed to the banks which was *exposed to the employees in the ordinary course of business*. The Court laid down a new principle of "assumption of risk". It said the *"depositor takes the*

risk, in revealing his affairs to another". The Court declared that the Fourth Amendment did not prohibit the obtaining of information *revealed to a third party and conveyed* by that party to government authorities. Once the person who had the privacy right "assumed the risk" of the information being conveyed to the outside world by the bank, he could make no kind of complaint. a

48. The above decision led to a serious criticism by jurists [see (A) below] that the broad proposition, namely, that once a person conveyed confidential documents to a third party, he would lose his privacy rights, was wrong and was based on the old concept of treating the right of privacy as one attached to property whereas the Court had, in *Katz*¹² accepted that the privacy right protected "individuals and not places"; Congress came forward with the Right to Financial Privacy Act, 1978 (Pub L No. 95-630) which provided several safeguards to secure privacy, namely, requiring reasonable cause and also enabling the customer to challenge the summons or warrant in a court of law before it could be executed; [see (B) below]. (We do not mean to say that any law which is not on those lines is invalid. Indian laws such as Section 132, etc. of the Indian Income Tax Act, 1961; or Sections 91, 165 and 166 of the Criminal Procedure Code, 1973 as to search and seizure have, as stated below, been extensively considered by the courts in India and have been held to be valid.) b

(A) *Criticism of Miller* c

(i) The majority in *Miller*³⁰ laid down that a customer who has conveyed his affairs to another had thereby lost his privacy rights. Prof. Tribe states in his treatise (see p. 1391) that this theory reveals "alarming tendencies" because the Court has gone back to the old theory that privacy is in relation to property while it has laid down that the right is one attached to the person rather than to property. If the right is to be held to be not attached to the person, then "we would not shield our account balances, income figures and personal telephone and address books from the public eye, but might instead go about with the information written on our 'foreheads or our bumper stickers' ". He observes that the majority in *Miller*³⁰ confused "privacy" with "secrecy" and that "even their notion of secrecy is a strange one, for a *secret remains a secret even when shared with those whom one selects for one's confidence*". Our cheques are not merely negotiable instruments but yet the world can learn a vast amount about us by knowing how and with whom we have spent our money. Same is the position when we use the telephone or post a letter. To say that one assumes great risks by opening a bank account appeared to be a wrong conclusion. Prof. Tribe asks a very pertinent question (p. 1392): d

"Yet one can hardly be said to have *assumed a risk of surveillance* in a context where, as a practical matter, one had no choice. Only the most committed — and perhaps civilly committable — *hermit can live without a telephone, without a bank account, without mail*. To say that one must take a bitter pill with the sweet when one licks a stamp is to exact a high constitutional price indeed for living in contemporary society." e

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He concludes (p. 1400):

- a "In our information-dense technological era, when living inevitably entails leaving not just informational footprints but parts of one's self in myriad directories, files, records and computers, to hold that the Fourteenth Amendment did not reserve to individuals some power to say *when and how and by whom* that information and those confidences were to be used, would be to denigrate the central role that informational autonomy must play in any developed concept of the self."
- b (ii) Prof. Yale Kamisar (again quoted by Prof. Tribe) (p. 1392) says:
"It is beginning to look as if the only way someone living in our society can avoid 'assuming the risk' that various intermediate institutions will reveal information to the police is by engaging in drastic discipline, the kind of discipline of life under *totalitarian regimes*."
- c This reminds us of what Mathew, J. said in *Gobind*²³, that we are not living in a Police Raj.
(iii) Richard Alexander, a jurist-lawyer in an article published in South West University Law Review (1978), Vol. 10 (pp. 13-33), titled "*Privacy, Banking Records and Supreme Court: A Before and After Look at Miller*"³⁰, says:
d "The Supreme Court (in *Miller*³⁰) followed the old property interest line of analysis under the Fourth Amendment, ... such confidentiality is due to the long-standing recognition that the information contained in such records is highly personal.... In the light of the liberty given to the Government to inspect banking records through use of administrative summonses, it is impossible to reconcile *Miller*³⁰ with *Katz*¹² and *Griswold*¹⁰.... The United States Supreme Court rejected the *Katz*'s¹²
e 'justifiable expectation of privacy' analysis and opted for a mechanical 'property interest' analysis which is unwieldy in its application to twentieth century technology."
(iv) Polyviou G. Polyviou in his book *Search and Seizure* (Duckworth, 1982) in an exhaustive discussion on *Miller*³⁰ (pp. 67 to 71) concludes that
f "*Miller*³⁰, partly through reliance on property considerations and partly through insensitive application of a rigid 'misplaced confidence' doctrine, has brought about a 'highly questionable' gap in Fourth Amendment coverage".
(v) La Hève in his book *Search and Seizure* (1978) (quoted by Polyviou) calls the *Miller*³⁰ decision as "pernicious" and characterises its reasoning as "woefully inadequate".
g (vi) Profs. Jackson and Tushnet in *Comparative Constitutions Law* (2001) say (p. 404) that "in the USA the Fourth Amendment to the Constitution bars police from conducting 'unreasonable' searches, but the Supreme Court has been willing to stamp nearly every troublesome form of police activity as either not a search or not unreasonable. *Oddly enough, the Court has made the law in this area nearly unintelligible....*"
h (vii) In this connection, two other articles, the *Note, Government Access to Bank Records* (1974) 83 YALE LAW JOURNAL 1439 and *A Bank Customer*

has no Reasonable Expectation of Privacy of Bank Records: United States v. Miller, 14 San Diego L. Rev. 414 (1977) are also relevant (quoted by Polyviou G. Polyviou, p. 67).

(B) Response to Miller by Congress

We shall next refer to the response by Congress to *Miller*³⁰. (As stated earlier, we should not be understood as necessarily recommending this law as a model for India.) Soon after *Miller*³⁰, Congress enacted the Right to Financial Privacy Act, 1978 (Public Law No. 95-630) 12 USC with Sections 3401 to 3422). The statute accords customers of banks or similar financial institutions, certain rights to be notified of and a right to challenge the actions of Government in court at an anterior stage before disclosure is made. Section 3401 of the Act contains "definitions". Section 3402 is important, and it says that "except as provided by Section 3403(c) or (d), 3413 or 3414, no government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and that (1) such customer has authorised such disclosure in accordance with Section 3404; (2) such records are disclosed in response to (a) administrative subpoenas or summons to meet requirement of Section 3405; (b) the requirements of a search warrant which meets the requirements of Section 3406; (c) requirements of a judicial subpoena which meets the requirement of Section 3407; or (d) the requirements of a formal written requirement under Section 3408. If the customer decides to challenge the Government's access to the records, he may file a motion in the appropriate US District Court, to prevent such access. The Act also provides for certain specific exceptions.

49. While we are on (B), it is necessary to make a brief reference to Section 93(1) of the Code of Criminal Procedure, 1973 which deals with power of the court to issue "search warrants" (a) where the court has "reason to believe" that a person to whom a summons or order under Section 91 or a requisition under Section 92(1) has been, or might be, addressed, will not or would not produce the document or thing as required by summons or requisition, or (b) where such document or thing is not known to the court to be in the possession of any person, or (c) where the court considers that the purposes of any inquiry, trial or other proceeding under the Code, will be served by a general search or inspection, it may issue a search warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions contained in the Code. Under Section 93(2), the court may, if it thinks fit, specify in the warrant, the place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified. Under Section 93(2), a warrant to search for a document, parcel or other thing in the custody of the postal or telegraph authority, has to be issued by the District Magistrate or the Chief Judicial Magistrate.

50. Section 165 of the Code deals with the power of a police officer to search. Under Section 165(1) he must have *reasonable grounds for believing* that anything necessary for the purpose of an investigation into any offence,

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a which he is authorised to investigate, may be found in any place within the limits of the police station and that such thing cannot, in his opinion, be otherwise obtained without undue delay. He has to *record* the grounds of his belief in writing and specify, so far as possible, the thing for which search is made. Section 166 refers to the question as to when an officer in charge of a police station may require another to issue search warrant.

b 51. In the Income Tax Act, 1961 elaborate provisions are made in regard to "search and seizure" in Section 132; power to requisition books of account, etc. in Section 132-A; power to call for information as stated in Section 133. Section 133(6) deals with power of officers to require any bank to furnish any information as specified there. There are safeguards. Section 132 uses the words "in consequence of *information* in his possession, *has reason to believe*". (emphasis supplied) Section 132(1-A) uses the words "in consequence of information in his possession, has reason to suspect". Section c 132(13) says that the provisions of the Code of Criminal Procedure, relating to searches and seizure shall apply, so far as may be, to searches and seizures under Sections 132(1) and 132(1-A). There are also Rules made under Section 132(14). Likewise Section 132-A(1) uses the words "in consequence of *information* in his possession, *has reason to believe*". (emphasis supplied) d Section 133 which deals with the power to call for information from banks and others uses the words "*for the purposes of this Act*" and Section 133(6) permits a requisition to be sent to a bank or its officer. There are other Central and State statutes dealing with procedure for "search and seizure" for the purposes of the respective statutes.

e 52. Under all these enactments, there are several judgments of this Court explaining the scope of the provisions, and the safeguards provided by those provisions while upholding their constitutional validity and pointing out their limitations. It is not necessary in this case to refer to those judgments. Suffice it to say that, in the present case we are concerned mainly with the validity of Section 73 of the Stamp Act, as amended in its application in 1986 in Andhra Pradesh.

f 53. Once we have accepted in *Gobind*²³ and in later cases that the right to privacy deals with "persons and not places", the documents or copies of documents of the customer which are in a bank, must continue to remain confidential vis-à-vis the person, even if they are no longer at the customer's house and have been voluntarily sent to a bank. If that be the correct view of the law, we cannot accept the line of *Miller*³⁰ in which the Court proceeded on the basis that the right to privacy is referable to the right of "property" theory. Once that is so, then unless there is some probable or reasonable g cause or reasonable basis or material before the Collector for reaching an opinion that the documents in the possession of the bank tend to secure any duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or taking notes or extracts therefore, cannot be valid. The above safeguards must necessarily be read into the provision relating to search and inspection and seizure so as to save it from any h unconstitutionality.

54. Secondly, the impugned provision in Section 73 enabling the Collector to authorise "any person" whatsoever to inspect, to take notes or extracts from the papers in the public office suffers from the vice of excessive delegation as there are no guidelines in the Act and more importantly, the section allows the facts relating to the customer's privacy to reach non-governmental persons and would, on that basis, be an unreasonable encroachment into the customer's rights. This part of Section 73 permitting delegation to "any person" suffers from the above serious defects and for that reason is, in our view, unenforceable. The State must clearly define the officers by designation or state that the power can be delegated to officers not below a particular rank in the official hierarchy, as may be designated by the State. a

55. The A.P. Amendment permits inspection being carried out by the Collector by having access to the documents which are in *private custody* i.e. custody other than that of a public officer. It is clear that this provision empowers invasion of the home of the person in whose possession the documents "tending" to or leading to the various facts stated in Section 73 are in existence and Section 73 being one without any safeguards as to probable or reasonable cause or reasonable basis or materials violates the right to privacy both of the house and of the person. We have already referred to *R. Rajagopal case*²⁵ wherein the learned Judges have held that the right to personal liberty also means life free from encroachments unsustainable in law, and such right flowing from Article 21 of the Constitution. b

56*. In *Maneka Gandhi v. Union of India*³¹ a seven-Judge Bench decision, P.N. Bhagwati, J. (as His Lordship then was) held that the expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given *additional protection* under Article 19 (emphasis supplied). Any law interfering with personal liberty of a person must satisfy a triple test: (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorising interference with personal liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14 it would be no procedure at all within the meaning of Article 21. c

57. The constitutional validity of the power conferred by law came to be decided from yet another angle in the case of *Air India v. Nergesh Meerza*³² wherein it was held that a discretionary power may not necessarily be a discriminatory power but where a statute confers a power on an authority to d

* Ed.: Para 56 corrected vide Official Corrigendum No. F-3/Ed.BJ/8/2005 dated 17-1-2005. e

31 (1978) 1 SCC 248

32 (1981) 4 SCC 335 : 1981 SCC (L&S) 599 f

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decide matters of moment without laying down any guidelines or principles or norms, the power has to be struck down as being violative of Article 14.

- a 58. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence and it cannot be acted upon by that person or by any public officer. This is the penalty which is imposed by law on the person who may seek to claim any benefit under an instrument if it is not duly stamped. Once detected, the authority competent to impound the document can recover not only duty but also
- b penalty, which provision protects the interest of revenue. In the event of there being criminal intention or fraud, the persons responsible may be liable to be prosecuted. The availability of these provisions, in our opinion, adequately protects the interest of revenue. Unbridled power available to be exercised by any person whom the Collector may think proper to authorise, without laying down any guidelines as to the persons who may be authorised and without
- c recording the availability of grounds which would give rise to the belief, on the existence whereof only, the power may be exercised, deprives the provision of the quality of reasonableness. Possessing a document not duly stamped is not by itself any offence. Under the garb of the power conferred by Section 73 the person authorised may go on a rampage searching house after house i.e. residences of the persons or the places used for the custody of
- d documents. The possibility of any wild exercise of such power may be remote, but then on the framing of Section 73, the provision impugned herein, the possibility cannot be ruled out. Any number of documents may be inspected, may be seized and may be removed and at the end the whole exercise may turn out to be an exercise in futility. The exercise may prove to be absolutely disproportionate to the purpose sought to be achieved and,
- e therefore, a reasonable nexus between stringency of the provision and the purpose sought to be achieved ceases to exist.

59. The abovesaid deficiency pointed out by the High Court and highlighted by the learned counsel for the respondents in this Court has not been removed even by the Rules. The learned counsel for the respondents has pointed out that under the Rules the obligation is cast on the bank or any

- f other person having custody of the documents though it may not be a party to the document, to pay the duty payable on the documents in order to secure release of the documents.

60. For the foregoing reasons we agree with the view taken by the High Court that Section 73 of the Indian Stamp Act as amended in its application to the State of Andhra Pradesh by Andhra Pradesh Act 17 of 1986 is ultra vires the Constitution. As we do not find any infirmity in the judgment of the High Court all the appeals are dismissed.

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(2007) 2 Supreme Court Cases 1

(BEFORE Y.K. SABHARWAL, C.J. AND ASHOK BHAN, DR. ARJIT PASAYAT,
B.P. SINGH, S.H. KAPADIA, C.K. TIAKKER, P.K. BALASUBRAMANYAN,
ALTAMAS KABIR AND D.K. JAIN, JJ.)

I.R. COELHO (DEAD) BY LRS.

Appellant;

Versus

d

STATE OF T.N.

Respondent.

Civil Appeals Nos. 1344-45 of 1976[†] with WPs (C) Nos. 242 of 1988, 751 of 1990, CAs Nos. 6045-46 of 2002, WP (C) No. 408 of 2003, SLPs (C) Nos. 14182, 14245, 14248-49, 26879, 14946-47, 26880-81, 14949, 26882, 14950, 26883, 14965, 26884, 14993, 15020, 26885, 15022, 15029, 14940 and 26886 of 2004, WPs (C) Nos. 454, 473 and 259 of 1994, 238 of 1995 and 35 of 1996, decided on January 11, 2007

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A. Constitution of India — Arts. 368 and 31-B r/w Sch. IX — Laws included in Sch. IX after 24-4-1973 — Protection available to — Constitutional amendments inserting such laws — Validity of — Scope and effect of inclusion of such laws in Sch. IX — Applicability of basic structure doctrine — Scope of judicial review — Held, all constitutional amendments made on or after 24-4-1973 by which Sch. IX is amended shall have to be tested on the touchstone of basic structure doctrine — So also, any law placed in Sch. IX has to satisfy the test of basic structure doctrine — Laws included in Sch. IX do not become part of the Constitution — They derive their validity on account of being included in Sch. IX, and this exercise has to be tested every time it is undertaken — Reasons for, extensively discussed — Supremacy of Constitution mandates a mechanism for testing validity of legislative acts through an independent organ viz. the judiciary

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— However, if validity of any Sch. IX law has already been upheld by Supreme Court, it would not be open to challenge again on principles declared in this judgment — But, if a law held to be violative of any rights in Pt. III is subsequently incorporated in Sch. IX after 24-4-1973, such

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[†] From the Judgment and Order dated 23-9-1976 of the High Court of Judicature at Madras in WPs Nos. 4386 of 1974 and 90 of 1975

violation/infraction shall be open to challenge under the basic structure doctrine — Action taken and transactions finalised as a result of the impugned statutes shall not be open to challenge — The petitions/appeals which gave rise to this reference directed to be placed before a three-Judge Bench for decision in accordance with principles laid down in this judgment a

B. Constitution of India — Arts. 368 and 31-B — Amendment of the Constitution — Scope of amending power of Parliament — Power to increase amending power — Unavailability of — Held, Parliament cannot increase the amending power by amendment of Art. 368 to confer on itself unlimited power of amendment and destroy and damage the fundamentals of the Constitution, nor can it use Art. 31-B to achieve the same purpose — Art. 31-B therefore cannot go beyond the limited amending power contained in Art. 368 b

C. Constitution of India — Art. 368 — Constitutional amendments — Applicability of basic structure doctrine, reiterated — Held, validity of each new constitutional amendment has to be judged on its own merits c

D. Constitution of India — Arts. 31-B, 31-A and 31-C — Relative scope of power under, and reasons for validity or invalidity of, compared

E. Constitution of India — Arts. 245, 32, 136 and 226 — Limitations on legislative power — Principle of constitutional supremacy — Mandate of — Held, constitutional supremacy mandates a mechanism for testing the validity of legislative Acts through an independent organ viz. the judiciary d

F. Constitution of India — Generally — Constitutional supremacy — Mandate of — Held, the supremacy of the Constitution mandates all constitutional bodies to comply with the provisions of the Constitution

The question that was before this nine-Judge Bench on reference was whether on and after 24-4-1973, the date on which the decision in *Kesavananda*, (1973) 4 SCC 225, was delivered, wherein the basic structure doctrine was propounded, is it permissible for Parliament under Article 31-B to immunise legislations from being struck down for violation of fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Supreme Court and the High Courts. e

Answering the reference in the terms below, the Supreme Court

Held:

The contention that Article 31-B read with the Ninth Schedule was held to be constitutionally valid in *Kesavananda* cannot be accepted. The validity thereof was not in question. The constitutional amendments under challenge in *Kesavananda* were examined assuming the constitutional validity of Article 31-B. Be that as it may, it will be assumed that Article 31-B is valid. In any case, the validity of the 1st Amendment inserting Article 31-B in the Constitution is not in challenge before this Bench. f
(Para 78) g

Since the majority in *Kesavananda* which propounded the basic structure doctrine did not unconditionally uphold the validity of the 29th Constitutional Amendment and six learned Judges forming the majority left that to be decided by a smaller Bench and upheld its validity subject to it passing the test of the basic structure doctrine, the factum of validity of the 29th Amendment in *Kesavananda* is not conclusive of matters under consideration before this Bench. h
The decision in *Kesavananda* regarding the Twenty-ninth Amendment is

restricted to that particular amendment and no principle flows therefrom.

(Paras 89 and 93)

- a The majority judgment in *Kesavananda* read with *Election case*, 1975 Supp SCC 1, requires the validity of each new constitutional amendment to be judged on its own merits. [Para 151(ii)]

- b The broad proposition urged by the petitioners that laws that have been found by the courts to be violative of Part III of the Constitution cannot be protected by placing the same in the Ninth Schedule by use of device of Article 31-B read with Article 368 of the Constitution, cannot be accepted. Ninth Schedule laws are not being per se held invalid, but what is being examined is the extent of the power which the legislature has come to possess. All amendments to the Constitution made on or after 24-4-1973 by which the Ninth Schedule has been amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution. Further, after a law is placed in the Ninth Schedule, its validity has to be tested on the touchstone of the basic structure doctrine. [Paras 75, 104 and 151(iii)]

- c The object behind Article 31-B is to remove difficulties and not to obliterate judicial review or Part III in its entirety. Therefore every amendment to the Constitution whether it be in the form of amendment of any article or amendment by insertion of an Act in the Ninth Schedule, has to be tested by reference to the doctrine of basic structure. Laws included in the Ninth Schedule do not become part of the Constitution, they derive their validity on account of the exercise undertaken by Parliament to include them in the Ninth Schedule. That exercise has to be tested every time it is undertaken.

(Paras 133, 140 and 124)

- e Each exercise of the amending power inserting laws into the Ninth Schedule entails a complete removal of the fundamental rights chapter vis-à-vis the laws that are added in the Ninth Schedule. Further, insertion in the Ninth Schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated. The consequence of insertion is that it nullifies the entire Part III of the Constitution. There is no constitutional control on such nullification. It means an unlimited power to totally nullify Part III insofar as the Ninth Schedule legislations are concerned. The supremacy of the Constitution mandates all constitutional bodies to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative Acts through an independent organ viz. the judiciary. Indeed, if Article 31-B only provided restricted immunity and it seems that original intent was only to protect a limited number of laws, it would have been only an exception to Part III and the basis for the initial upholding of the provision. However, the unchecked and rampant exercise of this power, the number of statutes inserted into Sch. IX having gone from 13 to 284, shows that it is no longer a mere exception. The absence of guidelines for exercise of such power means the absence of constitutional control which results in destruction of constitutional supremacy and creation of parliamentary hegemony and absence of full power of judicial review to determine the constitutional validity of such exercise. (Paras 98 and 103)

- g Parliament cannot increase the amending power by amendment of Article 368 to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution. Article 368 does not vest such a power in Parliament. It cannot lift all restrictions placed on the amending power

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or free the amending power from all its restrictions. This is the effect of the decision in *Kesavananda*. If constituent power under Article 368, the other name for amending power, cannot be made unlimited, it follows that Article 31-B cannot be so used as to confer unlimited power. Article 31-B cannot go beyond the limited amending power contained in Article 368. The power to amend Ninth Schedule flows from Article 368. This power of amendment has to be compatible with the limits on the power of amendment. This limit came with *Kesavananda*. Therefore Article 31-B after 24-4-1973 despite its wide language cannot confer unlimited or unregulated immunity. (Paras 125 and 126)

The relevance of *Election case*, 1975 Supp SCC 1, *Minerva Mills*, (1980) 3 SCC 625, and *Waman Rao case*, (1981) 2 SCC 362, lies in the fact that every improper enhancement of its own power by Parliament, be it Article 329-A(4) or Articles 368(4) and (5) or Section 4 of the 42nd Constitutional Amendment, has been held to be incompatible with the doctrine of basic structure as they introduced new elements which altered the identity of the Constitution or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded. They obliterated important elements like judicial review. They made directive principles en bloc a touchstone for obliteration of all the fundamental rights and provided for insertion of laws in the Ninth Schedule which had no nexus with agrarian reforms. (Para 138)

Regarding Articles 31-A and 31-C (validity whereof is not in question here) having been held to be valid despite denial of Article 14, it may be noted that these articles have an indicia which is not there in Article 31-B. Article 31-A does not exclude an uncatalogued number of laws from challenge on the basis of Part III. It provides for a standard by which laws stand excluded from judicial review. Likewise, Article 31-C applies the criteria of Articles 39(b) and (c) which refer to equitable distribution of resources as a yardstick. While examining the validity of Article 31-C in *Kesavananda* it was held that the vesting of power of the exclusion of judicial review in a legislature including a State Legislature, strikes at the basic structure of the Constitution. It is on this ground that the second part of Article 31-C was held to be beyond the permissible limits of power of amendment of the Constitution under Article 368. (Paras 142, 104 and 99)

If the validity of any Ninth Schedule law has already been upheld by the Supreme Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24-4-1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19, etc. and the principles underlying thereunder. [Para 151(v)]

Actions taken and transactions finalised as a result of the impugned Acts shall not be open to challenge. [Para 151(vi)]

Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; *Waman Rao v. Union of India*, (1981) 2 SCC 362; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625, clarified and followed

Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1, followed

Golak Nath v. State of Punjab, AIR 1967 SC 1643 : (1967) 2 SCR 762; *ADM, Jabalpur v. Shivakani Shukla*, (1976) 2 SCC 521, held, overruled

Sankari Prasad Singh Deo v. Union of India, AIR 1951 SC 458 : 1952 SCR 89; *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 : (1965) 1 SCR 933; *Kunjikutty Sahib v. State of Kerala*, (1972) 2 SCC 364; *State of Maharashtra v. Man Singh Suraj Singh*

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Padvi, (1978) 1 SCC 615; *N.B. Jeejeebhoy v. Asstt. Collector*, AIR 1965 SC 1096; *Balmadies Plantations Ltd. v. State of T.N.*, (1972) 2 SCC 133; *Kameshwar Singh v. State of Bihar*, AIR 1951 Pat 91 : ILR 30 Pat 454, referred to

- a It is directed that the petitions/appeals giving rise to this reference be now placed for hearing before a three-Judge Bench for decision in accordance with the principles laid down in this judgment. (Para 152)

- b G. Constitution of India — Arts. 368, 31-B r/w Sch. IX and Pt. III — Laws included in Sch. IX after 24-4-1973, and the constitutional amendments inserting such laws, which affect fundamental rights or the principles underlying/essence of fundamental rights — Protection available to such laws and validity of such constitutional amendments — Scope and effect of inclusion of such laws in Sch. IX — Applicability of basic structure doctrine — Scope of judicial review — Held, Parliament has power to amend provisions of Pt. III so as to abridge or take away fundamental rights, but that power is subject to limitation of basic structure doctrine — Hence, all constitutional amendments made on or after 24-4-1973 by which Sch. IX is amended by inclusion of various laws, and the laws so included in Sch. IX, shall have to be tested on the touchstone of basic structure doctrine as reflected in Art. 21 r/w Art. 14 and Art. 19; Art. 15 and Art. 14 r/w Arts. 16(4), (4-A) & (4-B); Arts. 20 and 32, etc., and the principles underlying them, or if the law(s) concerned infringe the essence of fundamental rights

- d H. Constitution of India — Arts. 368, 31-B r/w Sch. IX, 32 and Pt. III — Laws included in Sch. IX after 24-4-1973, and the constitutional amendments inserting such laws, which affect fundamental rights or the principles underlying/essence of fundamental rights — Extent and nature of judicial scrutiny attracted — Factors to be considered, tests to be applied and exercise to be undertaken by Court — Necessity to take synoptic view of Pt. III/Constitution — Standards to be applied depending on context — Held, every addition to Sch. IX triggers Art. 32 as part of the basic structure and is consequently subject to the review of fundamental rights as they stand in Pt. III

- e — *Individual examination of each law/constitutional amendment* — The laws that are included in Sch. IX have to be examined individually for determining whether the constitutional amendments by which they are put in Sch. IX damage or destroy the basic structure of the Constitution

- f — *Impact or "rights test" and "essence of right" test* — The actual or direct effect and impact of the impugned Sch. IX law on the rights guaranteed under Pt. III has to be considered for determining whether or not the law destroys the basic structure — Focus of Court is on the actual impairment caused by the law, rather than the literal validity of the law — This means that the form of the amendment is not the relevant factor, but the consequence thereof would be the determinative factor; this is the "rights test" — When in a controlled constitution conferring limited power of amendment, an entire chapter is made inapplicable as in the case of insertion of a law into Sch. IX under Art. 31-B, "essence of the right" test as applied in *M Nagaraj*, (2006) 8 SCC 212 [Ed.: see *Shortnote U*, para 37 therein], will have no applicability — In such a situation, it is the "rights test" which is more appropriate, which requires a synoptic view to be taken of the Constitution/fundamental rights chapter

— *Synoptic view* — As fundamental rights are interconnected, one has to take a synoptic view of the various articles in Pt. III while judging the impact of Sch. IX laws on the articles in Pt. III/Constitution

— *Compatibility test* — Basic structure doctrine requires the State to justify the degree of invasion of fundamental rights — Greater the invasion into essential freedoms, greater is the need for justification and determination by Court whether invasion was necessary, and if so, to what extent — Degree of invasion is for the Court and not Parliament to decide — Parliament is presumed to legislate compatibly with the fundamental rights and this is where judicial review comes in — Compatibility is one of the species of judicial review in which one has to see the effect of the impugned law on one hand and exclusion of Pt. III under Art. 31-B in its entirety at the will of Parliament on the other

— *Standard to be applied* — The extent of invasion of various freedoms that is permissible varies depending upon the context — Thus, application of a standard to determine the extent of invasion of freedoms that is permissible in a particular context is an important exercise to be undertaken by the Court in applying the basic structure doctrine — This exercise can be undertaken by the Court alone and not the prescribed authority under Art. 368

— *Step-wise approach* — For determining whether the impugned Sch. IX law which affects fundamental rights violates the basic structure, Court has to first find out whether the impugned Sch. IX law is violative of Pt. III — If it finds in the affirmative, the further examination to be undertaken by the Court is whether the violation is found destructive of the basic structure — If this is found in the affirmative also, the result would be invalidation of the Sch. IX law concerned — Instances discussed

I. Constitution of India — Arts. 14, 15, 16, 31-B r/w Sch. IX and Art. 368 — Laws included in Sch. IX after 24-4-1973, and the constitutional amendments inserting such laws, affecting fundamental rights under Arts. 14, 15 and 16 — Considerations involved in testing validity of — Balancing of general right of equality under Art. 14 with that under Art. 15(4) when excessiveness is detected in grant of protective discrimination — Balancing of formal equality enshrined in Art. 16(1) with egalitarian equality enshrined in Art. 16(4)

J. Constitution of India — Pt. III — Fundamental rights — Nature of — Interconnectedness of fundamental rights, reiterated

K. Constitution of India — Arts. 368, 31-B r/w Sch. IX and Pt. III — Constitutional amendments affecting fundamental rights — Testing on touchstone of basic structure — Application of a standard to determine the extent of invasion of freedoms permissible in a particular context — Authority competent therefor, held, is the Court and not Parliament

L. Constitution of India — Arts. 14, 15, 16, 19, 20, 21, 32 and 31-B r/w Sch. IX and 368 — Fundamental rights that are part of the basic structure of the Constitution — Held, Art. 21 r/w Art. 14 and Art. 19; Art. 15 and Art. 14 r/w Arts. 16(4), (4-A) & (4-B); Arts. 20 and 32, etc., including the principles or essence underlying them, are part of the basic structure of the Constitution

a M. Constitution of India — Arts. 14, 31-B r/w Sch. IX and 368 — Nature of Art. 14 — Extent to which part of the basic structure of the Constitution — Held, essence of the principle behind Art. 14 is part of the basic structure — In fact, essence or principle of the right or nature of violation is more important than equality in the abstract or formal sense

b N. Constitution of India — Pt. III and Arts. 31-B r/w Sch. IX and 368 — Amendability of fundamental rights — Permissibility and extent of — Held, Parliament has power to amend provisions of Pt. III so as to abridge or take away fundamental rights, but that power is subject to limitation of basic structure doctrine

O. Constitution of India — Arts. 368 and 31-B r/w Sch. IX — Elements of basic structure of the Constitution — Instances of — Reiterated, that secularism, separation of powers, equality and judicial review are basic features of Constitution and essential elements of the rule of law — Rule of Law

c P. Constitution of India — Art. 19(1)(a) — Freedom of Press — If part of freedom guaranteed under Art. 19(1)(a) — Reiterated, that freedom of press which, though not separately and specifically guaranteed, has been read as part of Art. 19(1)(a)

d Q. Constitution of India — Pt. III and Preamble — Secularism — Repositories of, in the Constitution — Held, secular character of the Constitution is a matter of conclusion to be drawn from various articles conferring fundamental rights — If the secular character is not to be found in Pt. III, it cannot be found anywhere else in the Constitution because every fundamental right in Pt. III stands either for a principle or a matter of detail

e R. Constitution of India — Pt. III — Fundamental rights — Contents of — Held, every fundamental right in Pt. III stands either for a principle or a matter of detail

S. Constitution of India — Pt. III and Arts. 14, 15 and 16 — Existence of social content in fundamental rights — View taken in *M. Nagaraj*, (2006) 8 SCC 212, reiterated

f T. Constitution of India — Arts. 368 and 31-B r/w Sch. IX — Applicability of basic structure doctrine — Factors to be considered — Held, developments made in the field of constitutional interpretation and expansion of judicial review shall have to be kept in view while deciding the applicability of the basic structure doctrine

Held :

g "If by a constitutional amendment, the application of Articles 14 and 19 is withdrawn from a defined field of legislative activity, which is reasonably in public interest, the basic framework of the Constitution may remain unimpaired. But if the protection of those articles is withdrawn in respect of an uncatalogued variety of laws, fundamental freedoms will become a 'parchment in a glass case' to be viewed as a matter of historical curiosity." These observations made in *Minerva Mills case*, (1980) 3 SCC 625, are very apt for deciding the extent and scope of judicial review in cases wherein entire Part III, including Articles 14, 19, 20, 21 and 32 stand excluded without any yardstick. (Para 49)

h *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625, followed

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The developments made in the field of constitutional interpretation and expansion of judicial review shall have to be kept in view while deciding the applicability of the basic structure doctrine—to find out whether there has been violation of any fundamental right, the extent of violation, does it destroy the balance or it maintains the reasonable balance. (Paras 50 and 42)

[Ed.: See *Shortnote X* also, below.]

Parliament has power to amend the provisions of Part III so as to abridge or take away fundamental rights, but that power is subject to the limitation of the basic structure doctrine. It is permissible for the legislature to amend the Ninth Schedule and grant a law the protection in terms of Article 31-B but subject to the right of the citizen to assail it on the enlarged judicial review concept. If a law that abrogates or abridges rights guaranteed by Part III of the Constitution violates the basic structure doctrine, whether by amendment of any article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the court. The legislature cannot grant fictional immunities and exclude the examination of the Ninth Schedule law by the Court after the enunciation of the basic structure doctrine. All amendments to the Constitution made on or after 24-4-1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14 and Article 19; Article 15 and Article 14 read with Articles 16(4), (4-A) & (4-B); Articles 20 and 32, etc., and the principles underlying them. To put it differently after 24-4-1973 the laws included in the Ninth Schedule would not have absolute immunity. Even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure or if the law infringes the essence of any of such fundamental rights. Thus, validity of such laws can be challenged on the touchstone of basic structure such as reflected in the fundamental rights as listed above and the principles underlying these articles.

[Paras 97, 100, 106, 109, 114, 118, 123, 133, 143, 145 to 147 and 151(i) & (iii)]

It cannot be held that essence of the principle behind Article 14 is not part of the basic structure. In fact, essence or principle of the right or nature of violation is more important than equality in the abstract or formal sense. The majority opinion in *Kesavananda* clearly is that the principles behind fundamental rights are part of the basic structure of the Constitution. (Para 109)

Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by constitutional amendments shall be a matter of constitutional adjudication by examining the nature and extent of infraction of a fundamental right by a statute sought to be constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19. [Para 151(iv)]

To legislatively override entire Part III of the Constitution by invoking Article 31-B would not only make the fundamental rights overridden by directive principles but it would also defeat fundamentals such as secularism, separation of powers, equality and also judicial review which are the basic features of the Constitution and essential elements of rule of law, and that too without any yardstick/standard being provided under Article 31-B. (Para 127)

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- a While laws may be added to the Ninth Schedule, once Article 32 is triggered, these legislations must answer to the complete test of fundamental rights. Every insertion into the Ninth Schedule does not restrict Part III review, it completely excludes Part III at will. For this reason, every addition to the Ninth Schedule triggers Article 32 as part of the basic structure and is consequently subject to the review of the fundamental rights as they stand in Part III.

(Paras 116 and 102)

- b Whether the impact of an amendment to Part III results in violation of the basic structure, and the extent of abrogation and limit of abridgment shall have to be examined in each individual case. The laws that are included in the Ninth Schedule have to be examined individually for determining whether the constitutional amendments by which they are put in the Ninth Schedule damage or destroy the basic structure of the Constitution. The placement of a right in the scheme of the Constitution, the impact of the offending law on that right, the effect of the exclusion of that right from judicial review, the abrogation of the principle or the essence of that right is an exercise which cannot be denied on the basis of fictional immunity under Article 31-B. (Paras 95, 106, 107, 114 and 148)

- c The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys the basic structure. The impact test would determine the validity of the challenge. The focus of the Court is on the actual impairment caused by the law, rather than the literal validity of the law. The Supreme Court being bound by all the provisions of the Constitution and also by the basic structure doctrine has necessarily to scrutinise the Ninth Schedule laws. It has to examine the terms of the statute, the nature of the rights involved, etc. to determine whether in effect and substance the statute violates the essential features of the Constitution. For so doing, it has to first find whether the Ninth Schedule law is violative of Part III. If on such examination, the answer is in the affirmative, the further examination to be undertaken is whether the violation found is destructive of the basic structure doctrine. If on such further examination the answer is again in the affirmative, the result would be invalidation of the Ninth Schedule law. Therefore, first the violation of rights of Part III is required to be determined, then its impact examined, and if it shows that in effect and substance, it destroys the basic structure of the Constitution, the consequence of invalidation has to follow. [Paras 56, 106, 148 and 151(ii)]

- f Take the example of freedom of press which, though not separately and specifically guaranteed, has been read as part of Article 19(1)(a). If Article 19(1)(a) is sought to be amended so as to abrogate such right (which it is hoped will never be done), the acceptance of the respondent's contention would mean that such amendment would fall outside judicial scrutiny when the law curtailing these rights is placed in the Ninth Schedule as a result of immunity granted by Article 31-B. The impact of such an amendment shall have to be tested on the touchstone of rights and freedoms guaranteed by Part III of the Constitution. In a given case, even abridgement may destroy the real freedom of the press and, thus, be destructive of the basic structure. (Para 106)

- g Take another example. The secular character of our Constitution is a matter of conclusion to be drawn from various articles conferring fundamental rights; and if the secular character is not to be found in Part III, it cannot be found anywhere else in the Constitution because every fundamental right in Part III stands either for a principle or a matter of detail. Fundamental rights are

interconnected. Therefore, one has to take a synoptic view of the various articles in Part III while judging the impact of the laws incorporated in the Ninth Schedule on the articles in Part III. It is not necessary to multiply the illustrations. (Paras 106 and 123) a

When the golden triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the "essence of right" test but also the "rights test" has to apply taking the synoptic view of the articles in Part III. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule.

[Paras 140 and 151(iv)] b

Hence, the constitutional validity of the Ninth Schedule laws on the touchstone of basic structure doctrine can be adjudged by applying the direct impact and effect test i.e. "rights test", which means the form of an amendment is not the relevant factor, but the consequence thereof would be determinative factor. (Para 150)

There is a difference between the "rights test" and the "essence of right test". Both form part of application of the basic structure doctrine. When in a controlled constitution conferring limited power of amendment, an entire chapter is made inapplicable, "the essence of the right" test as applied in *M. Nagaraj case*, (2006) 8 SCC 212, will have no applicability. In such a situation, to judge the validity of the law, it is the "rights test" which is more appropriate. The fact of validation of laws based on exercise of blanket immunity granted by Article 31-B eliminates Part III in entirety hence the "rights test" as part of the basic structure doctrine has to apply. The situation where entire equality code, freedom code and right to move court under Part III are all nullified by exercise of power to grant immunisation at will by Parliament is incompatible with the implied limitation of the power of Parliament. In such a case, it is the "rights test" that is appropriate and is to be applied. For the correct interpretation, Article 368 requires a synoptic view of the Constitution between its various provisions which, at first sight, look disconnected. (Paras 142 and 118) c

Article 31-B gives validation based on fictional immunity. In judging the validity of a constitutional amendment the Court has to be guided by the impact test. The basic structure doctrine requires the State to justify the degree of invasion of fundamental rights. Parliament is presumed to legislate compatibly with the fundamental rights and this is where judicial review comes in. The greater the invasion into essential freedoms, greater is the need for justification and determination by Court whether invasion was necessary and if so to what extent. The degree of invasion is for the Court to decide. In respect of the inclusion of laws in the Ninth Schedule the principle of compatibility will come in. One has to see the effect of the impugned law on one hand and the exclusion of Part III in its entirety at the will of Parliament. Compatibility is one of the species of judicial review which is premised on compatibility with rights regarded as fundamental. The power to grant immunity, at will, on fictional basis, without full judicial review, will nullify the entire basic structure doctrine. d

(Paras 149 and 133) e

The doctrine of basic structure as a principle has now become an axiom. It is premised on the basis that invasion of certain freedoms needs to be justified. It is the invasion which attracts the basic structure doctrine. Certain freedoms may justifiably be interfered with. If freedom, for example, is interfered with in cases f

h

a relating to terrorism, it does not follow that the same test can be applied to all the offences. Thus, the application of a standard is an important exercise required to be undertaken by the Court in applying the basic structure doctrine and that has to be done by the courts and not by the prescribed authority under Article 368. The existence of the power of Parliament to amend the Constitution at will, with requisite voting strength, so as to make any kind of laws that exclude Part III including power of judicial review under Article 32, is incompatible with the basic structure doctrine. (Para 147)

b It would be incorrect to assume that social content exists only in directive principles and not in the fundamental rights. As held in *M. Nagaraj*, (2006) 8 SCC 212, egalitarian equality exists in Article 14 read with Articles 16(4), (4-A), (4-B). Articles 15 and 16 are facets of Article 14. Therefore, it is wrong to suggest that equity and justice find place only in the directive principles. Article 16(1) concerns formal equality which is the basis of the rule of law. At the same time, Article 16(4) refers to egalitarian equality. Similarly, the general right of equality under Article 14 has to be balanced with Article 15(4) when excessiveness is detected in grant of protective discrimination. Article 15(1) limits the rights of the State by providing that there shall be no discrimination on the grounds only of religion, race, caste, sex, etc. and yet it permits classification for certain classes, hence social content exists in fundamental rights as well. All these are relevant considerations to test the validity of the Ninth Schedule laws. (Paras 128 and 105)

d *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, clarified and followed
Attorney General for India v. Amratalal Prajivandas, (1994) 5 SCC 54 : 1994 SCC (Cri) 1325, clarified

Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625; *Waman Rao v. Union of India*, (1981) 2 SCC 362; *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248; *Bhim Singhji v. Union of India*, (1981) 1 SCC 166; *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, relied on

e Seervai: *Constitutional Law of India* (40th Edn., Vol. III), relied on

I.R. Coelho v. State of T.N., (1999) 7 SCC 580, referred to

U. Constitution of India — Arts. 31-B r/w Sch. IX and 368 — Likelihood of abuse of Art. 31-B — Effect on validity thereof — Held, mere possibility of abuse is not a relevant test to determine validity of a provision

f It was contended that the power to pack up laws in the Ninth Schedule in absence of any indicia in Article 31-B has been abused and that abuse is likely to continue. It is submitted that the Ninth Schedule which commenced with only 13 enactments has now a list of 284 enactments. The validity of Article 31-B is not in question before this Bench. Further, mere possibility of abuse is not a relevant test to determine the validity of a provision. The people, through the Constitution, have vested the power to make laws in their representatives through Parliament in the same manner in which they have entrusted the responsibility to adjudge, interpret and construe law and the Constitution including its limitation in the judiciary. Hence no assumption can be made about the alleged abuse of the power. (Para 76)

g V. Constitution of India — Arts. 368, 31-B r/w Sch. IX and Pt. III — Fundamental rights if outside the purview of the basic structure of Constitution — Clarified, the view in *Kesavananda*, (1973) 4 SCC 225 is that at least some fundamental rights do form part of the basic structure of the Constitution — In *Election case*, 1975 Supp SCC 1, Khanna, J. made it clear

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that he had never opined that fundamental rights were outside the purview of the basic structure — Certain fundamental rights, and the principles that underlie them are foundational not only to the Indian democracy, but democracies around the world — India's constitutional history has led us to include the essence of each of our fundamental rights in the basic structure — History of emergence of modern democracy has also been the history of securing basic rights for the people of other nations also — Situation and epoch making events and revolutions in such other nations, discussed

W. Constitution of India — Arts. 368, 31-B r/w Sch. IX and Pt. III — Fundamental rights that are part of the basic structure of the Constitution — Extent to which protected — Essence of principles behind fundamental rights — Held, India's constitutional history has led us to include the essence of each of our fundamental rights in the basic structure

The view in *Kesavananda* is that at least some fundamental rights do form part of basic structure of the Constitution. Detailed discussion in *Kesavananda* to demonstrate that the right to property was not part of basic structure of the Constitution by itself shows that some of the fundamental rights are part of the basic structure of the Constitution. In order to understand the view of Khanna J. in *Kesavananda* it is important to take into account his later clarification. In *Election case*, 1975 Supp SCC 1, Khanna, J. made it clear that he never opined that fundamental rights were outside the purview of the basic structure.

(Paras 107, 90 and 96)

Kesavananda Bhuruti v. State of Kerala, (1973) 4 SCC 225, clarified

Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1, followed

The framers of the Constitution have built a wall around certain parts of fundamental rights, which has to remain forever, limiting ability of majority to intrude upon them. That wall is the "basic structure" doctrine. Our Constitution will almost certainly continue to be amended as India grows and changes. However, a democratic India will not grow out of the need for protecting the principles behind our fundamental rights.

(Paras 102 and 112)

Certain fundamental rights, and the principles that underlie them, are foundational not only to the Indian democracy, but democracies around the world. Throughout the world nations have declared that certain provisions or principles in their constitutions are inviolable. Other countries having a controlled constitution, like Germany, have embraced the idea that there is a basic structure to their constitutions and in doing so have entrenched various rights as core constitutional commitments. India's constitutional history has led us to include the essence of each of our fundamental rights in the basic structure of our Constitution.

(Paras 111 and 113)

The history of the emergence of modern democracy has also been the history of securing basic rights for the people of other nations also. In the United States the Constitution was finally ratified only upon an understanding that a Bill of Rights would be immediately added guaranteeing certain basic freedoms to its citizens. At about the same time when the Bill of Rights was being ratified in America, the French Revolution declared the Rights of Man to Europe. When the death of colonialism and the end of World War II birthed new nations across the globe, these States embraced rights as foundations to their new constitutions. Similarly, the rapid increase in the creation of constitutions that coincided with the end of the Cold War has planted rights at the base of these documents. Even

- a countries that have long respected and upheld rights, but in whose governance traditions did not include their constitutional affirmation have recently felt they could no longer leave their deep commitment to rights left unstated. In 1998, the United Kingdom adopted the Human Rights Act which gave explicit effect to the European Convention on Human Rights. In Canada, "the Constitution Act of 1982" enshrined certain basic rights into their system of governance.

(Paras 110 and 111)

- b X. Constitution of India — Arts. 368, 31-B r/w Sch. IX and Pt. III — Fundamental rights that are part of the basic structure of the Constitution — Determination of — Approach to be taken — Factors to be considered — Cardinal importance of fundamental rights in constitutional scheme — Broad interpretation vis-à-vis narrow interpretation of fundamental rights — Held, the said determination has to be undertaken having regard to the enlightened point of view as a result of the development of the fundamental rights by the Supreme Court over the years wherein the broad interpretation of fundamental rights has come to hold sway —
- c Interpretation of Constitution has to be such as to enable citizens to enjoy the rights guaranteed by Pt. III in the fullest measure — Fundamental rights are the heart and soul of the Constitution and have enjoyed a special and privileged place in the Constitution — Fundamental rights are those rights of citizens or those negative obligations of the State which do not permit encroachment on individual liberties — Development of
- d fundamental rights over the years, traced — Constitutional Interpretation — Interpretation of particular provisions — Interpretation of fundamental rights

- e Y. Constitution of India — Pts. III & IV and Arts. 368 & 31-B r/w Sch. IX — Primacy of Pt. III — Balance provided for between fundamental rights and directive principles in the Constitution — Nature of — If part of basic structure of the Constitution — Line to be drawn between public good and individual liberty — Held, Pts. III and IV make it the responsibility of the Government to adopt a middle path between individual liberty and public good — Though balance between Pts. III and IV can be tilted in favour of public good, it cannot be overturned by completely overriding individual liberty — This balance is an essential feature of the Constitution — To destroy the guarantees given by Pt. III in order to purportedly achieve
- f goals of Pt. IV is plainly to subvert the Constitution by destroying the essential element of its basic structure — Goals set out in Pt. IV have to be achieved without abrogation of the means provided for by Pt. III — Human and Civil Rights — Preservation and protection of individual liberty in Indian Constitution — Extent of

- g Z. Constitution of India — Pt. III and Art. 245 — Fundamental rights — Nature of — Extent of protection available under — Check on legislative power — Held, fundamental rights are not limited, narrow rights but provide a broad check against the violations and excesses by State authorities — They have proved to be the most significant constitutional control on the Government, particularly legislative power — These rights collectively form a comprehensive test against the arbitrary exercise of State power in any area

- h ZA. Constitution of India — Pt. III — Fundamental rights — Object of — Held, the same are to foster a social revolution by creating a society

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egalitarian to the extent that all citizens are equally free from coercion and restriction by the State — Human and Civil Rights — Object of fundamental rights in Indian Constitution

ZB. Constitution of India — Art. 14, Pts. III & IV and Preamble — Nature of equality under the Constitution — Role of economic growth and social equity — Relationship of, with individual rights — Held, economic growth and social equity are the two pillars of our Constitution which are linked to individual rights (right to equal opportunity), rather than in the abstract ^a

ZC. Constitution of India — Pt. III — Fundamental rights — Extent of interconnectedness — Held, the fundamental rights are deeply interconnected — Each supports and strengthens the work of the others ^b

ZD. Constitution of India — Arts. 368, 31-B r/w Sch. IX and Pt. III — Construal of basic structure doctrine — March of time and development of law — Necessity to consider — Constitutional Interpretation — Temporally concordant exposition of the Constitution — Necessity of ^c

The Constitution is a living document. Constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law. (Paras 42 and 50)

The fundamentalness of fundamental rights has to be examined having regard to the enlightened point of view as a result of development of fundamental rights over the years. The abrogation or abridgment of the fundamental rights under Chapter III have to be examined on the broad interpretation, the narrow interpretation of fundamental rights chapter is a thing of past. Interpretation of the Constitution has to be such as to enable the citizens to enjoy the rights guaranteed by Part III in the fullest measure. It is, therefore, imperative to understand the nature of guarantees under fundamental rights as understood in the years that immediately followed after the Constitution was enforced when fundamental rights were viewed by the Supreme Court as distinct and separate rights. In the early years, the scope of the guarantee provided by these rights was considered to be very narrow. Individuals could only claim limited protection against the State. This position has changed since long. Over the years, the jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power. Fundamental rights enshrined in Part III were added to the Constitution as a check on the State power, particularly the legislative power. Through Article 13 it is provided that the State cannot make any laws that are contrary to Part III. The transition from a set of independent, narrow rights to broad checks on State power is demonstrated by a series of cases that have been decided by the Supreme Court. It can no longer be contended that protection provided by fundamental rights comes in isolated pools. On the contrary, these rights together provide a comprehensive guarantee against excesses by State authorities. Post-*Maneka Gandhi case*, (1978) 1 SCC 248, it is clear that the development of fundamental rights has been such that it no longer involves the interpretation of rights as isolated protections which directly arise ^d ^e ^f ^g ^h

but they collectively form a comprehensive test against the arbitrary exercise of State power in any area that occurs as an inevitable consequence. The protection of fundamental rights has, therefore, been considerably widened.

a (Paras 56, 60, 62 and 102)

It is necessary to always bear in mind that fundamental rights have been considered to be the heart and soul of the Constitution. These rights have been further defined and redefined through various trials having regard to various experiences and some attempts to invade and nullify these rights. The fundamental rights are deeply interconnected. Each supports and strengthens the work of the others. The Constitution is a living document, its interpretation may change as the time and circumstances change to keep pace with it. (Para 109)

b

The fundamental rights have always enjoyed a special and privileged place in the Constitution. Regarding the status and stature of fundamental rights in the constitutional scheme, it is to be remembered that fundamental rights are those rights of citizens or those negative obligations of the State which do not permit encroachment on individual liberties. The State is to deny no one equality before the law. Economic growth and social equity are the two pillars of our Constitution which are linked to the rights of an individual (right to equal opportunity), rather than in the abstract. The object of the fundamental rights is to foster a social revolution by creating a society egalitarian to the extent that all citizens are to be equally free from coercion or restriction by the State. By enacting fundamental rights and directive principles which are negative and positive obligations of the States, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental rights and directive principles have to be balanced. That balance can be tilted in favour of the public good. The balance, however, cannot be overturned by completely overriding individual liberty. This balance is an essential feature of the Constitution. To destroy the guarantees given by Part III in order to purportedly achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure. Fundamental rights occupy a unique place in the lives of civilised societies and have been described in judgments as "transcendental", "inalienable" and "primordial". They constitute the ark of the Constitution. Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution. It is to be traced for a deep understanding of the scheme of the Indian Constitution. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy the essential element of the basic structure of the Constitution. (Paras 101, 105 and 49)

c

g *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625; *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248; *Sakal Papers (P) Ltd. v. Union of India*, AIR 1962 SC 305 : (1962) 3 SCR 842; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *Sambhu Nath Sarkar v. State of W.B.*, (1973) 1 SCC 856 : 1973 SCC (Cri) 618; *Haradhan Saha v. State of W.B.*, (1975) 3 SCC 198 : 1974 SCC (Cri) 816; *Khudiram Das v. State of W.B.*, (1975) 2 SCC 81 : 1975 SCC (Cri) 435, followed

h *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, affirmed and followed

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A.K. Gopalan v. State of Madras, AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cr LJ 1383, *held overruled*

State of Bombay v. Bhanji Munji, AIR 1955 SC 41 : (1955) 1 SCR 777, *impliedly disapproved* a

State of W.B. v. Anwar Ali Sarkar, AIR 1952 SC 75 : 1952 SCR 284 : 1952 Cr LJ 510; *Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123 : 1952 SCR 435 : 1952 Cr LJ 805; *Kerala Education Bill, 1975, In re*, AIR 1958 SC 956; *All India Bank Employees' Assn. v. National Industrial Tribunal*, AIR 1962 SC 171; *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788, *cited*

ZI. Constitution of India — Arts. 368, 31-B r/w Sch. IX and Pt. III — Fundamental rights that are part of the basic structure of the Constitution — Determination of — Factors to be considered — Partial excludability of a feature — Held, the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that a particular feature is not part of the basic structure b

ZI. Constitution of India — Arts. 14, 368 and 31-B r/w Sch. IX — Equality — Importance of, in constitutional scheme — If part of the basic structure of the Constitution — Determination of — Factors to be considered — Partial excludability of — Held, the mere fact that equality which is a part of the basic structure, can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being a part of the basic structure — Without equality the rule of law, secularism, etc. would fail c

The mere fact that equality, which is a part of the basic structure, can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether any particular feature of the Constitution is part of the basic structure—rule of law, separation of powers—the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of the basic structure. (Para 130) d

ZG. Constitution of India — Arts. 368, 31-B r/w Sch. IX, Pt. III and Arts. 14, 15, 19, 20, 21, 32 and 359 — Fundamental rights that are part of the basic structure of the Constitution — Held, golden triangle of Arts. 14, 19 and 21 as it stands for equality and rule of law, along with Arts. 15, 20 and 32, etc. clearly form part of the basic structure of the Constitution and cannot be abrogated — These articles stand altogether on a different footing — This fact has been recognised even by Parliament, by the 44th Constitutional Amendment whereby Arts. 20 and 21 can no longer be suspended during Emergency under Art. 359 e

ZH. Constitution of India — Art. 21 — Importance of, in constitutional scheme — Held, Art. 21 is the heart of the Constitution — It confers right to life as well as right of choice f

ZI. Constitution of India — Arts. 368, 31-B r/w Sch. IX — Basic features of Constitution — Instances — Held, rule of law and the federal structure are part of the basic structure — Rule of Law g

ZJ. Constitution of India — Sch. VII and Art. 368 — Extent to which Sch. VII may be amended — Held, Parliament can make additions in three legislative lists, but cannot abrogate all the lists as it would abrogate the federal structure h

L.R. COELHO v. STATE OF T.N.

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- a** ZK. Constitution of India — Art. 21 r/w Arts. 14 & 15 and Preamble — Secularism — Repositories of, in Constitution — Held, Art. 21 r/w Arts. 14 & 15 represent secularism [Ed.: *Queare*: do not Arts. 25, 26, 29 and 30 also represent secularism?]

- b** The golden triangle of Articles 14, 19 and 21 as it stands for equality and rule of law clearly forms part of the basic structure of the Constitution and cannot be abrogated. These articles stand on altogether different footing. Article 21 is the heart of the Constitution. It confers right to life as well as right to choose. Article 15, Article 21 read with Articles 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution. The fact that some articles in Part III stand alone has been recognised even by Parliament, for example, Articles 20 and 21. Article 359 provides for suspension of the enforcement of the rights conferred by Part III during Emergencies. However, by the Constitution (Forty-fourth Amendment) Act, 1978, it has been provided that even during Emergencies, the enforcement of the rights under Articles 20 and 21 cannot be suspended. This is the recognition given by Parliament to the protections granted under Articles 20 and 21. No discussion or argument is needed for the conclusion that these rights are part of the basic structure or framework of the Constitution. Same would be the position in respect of the rights under Article 32, again, a part of the basic structure of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure doctrine, the object of which is to protect basic features of the Constitution as indicated by the synoptic view of the rights in Part III.
- c** (Paras 109, 140, 141, 146 and 149)
- d** Secularism (Article 21 read with Articles 14 and 15 represent secularism) is one fundamental of the Constitution, equality is the other, to give a few examples to illustrate the point. It would show that it is impermissible to destroy Articles 14 and 15 or abrogate or en bloc eliminate these fundamental rights. To further illustrate the point, it may be noted that Parliament can make additions in the three legislative lists, but cannot abrogate all the lists as it would abrogate the federal structure. Without equality the rule of law, secularism, etc. would fail.

(Paras 105, 124 and 125)

- f** ZL. Constitution of India — Generally — Arts. 368 and 31-B r/w Sch. IX, Pt. III and Preamble — Nature of Indian Constitution — Constitutionalism, common law constitutionalism, constitutional sovereignty, controlled constitution — What are, explained — Importance of checks and balances residing in the separation of powers and diffusion of power amongst different independent centres of decision making, emphasised — Constitutional sovereignty distinguished from parliamentary sovereignty — Held, Parliament can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes — Protection of fundamental constitutional rights through the common law is a main feature of common law constitutionalism — Words and phrases — Constitutional Law — Separation of powers — Importance of — Held, separation of powers between Legislature, Executive and Judiciary constitutes one of the basic features of the Constitution
- g**
- h** ZM. Constitution of India — Arts. 32, 136, 226, 368, 31-B r/w Sch. IX and Pt. III — Determination of validity of constitutional amendments on

touchstone of basic structure doctrine — Authority competent for — Held, authority to enact law and decide the legality thereof cannot vest in one organ of the State — It would disturb the checks and balances in the Constitution — Validity of limitation on rights in Pt. III can only be examined by another independent organ, namely, the judiciary a

ZN. Constitution of India — Arts. 32, 226, 136 and Pt. III — Protection of fundamental rights — Role and suitability of judiciary as sentinel of fundamental rights — Held, it is the job of the judiciary to ensure that the Government on the basis of number does not override fundamental rights — Judiciary is the best institution to protect fundamental rights, given its independent nature and also because it involves interpretation based on the assessment of values besides textual interpretation — It enables application of principles of justice and law — It is therefore that power for enforcement of fundamental rights has been vested by the Constitution in Supreme Court and High Courts — Judiciary b

ZO. Constitution of India — Arts. 32, 226, 136, 368 and 31-B r/w Sch. IX — Place of judicial review in the constitutional scheme — Extent of judicial review which is part of basic structure of Constitution — Held, after enunciation of the basic structure doctrine, full judicial review is an integral part of the Constitutional Scheme — Jurisdiction so conferred on High Courts and Supreme Court is part of the inviolable basic structure of the Constitution — Judicial review c

ZP. Constitution of India — Arts. 32, 226, 136 and 14, 19 & 21 — Principles that form basis of judicial review — Held, Arts. 14, 19, 21 represent the foundational values which form the basis of judicial review apart from the rule of law and separation of powers — Judicial review d

ZQ. Constitution of India — Arts. 14, 32, 226 and 136 — Equality, rule of law, judicial review and separation of powers — Importance of — Interrelationship between, explained — Rule of Law — Judicial review — Constitutional Law — Separation of Powers e

ZR. Constitution of India — Arts. 32 and 136 — Duty of Supreme Court as ultimate interpreter of Constitution, held, is to uphold the constitutional values and enforce constitutional limitations

The principle of constitutionalism requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers; it requires a diffusion of powers, necessitating different independent centres of decision-making. Under the controlled constitution, the principles of checks and balances have an important role to play. The principle of constitutionalism underpins the principle of legality which requires the courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes. The protection of fundamental constitutional rights through the common law is the main feature of common law constitutionalism. f

(Paras 43, 44 and 47) g
h

a There is a difference between parliamentary and constitutional sovereignty. Our Constitution is framed by a Constituent Assembly which was not Parliament. It is in the exercise of law-making power by the Constituent Assembly that we have a controlled Constitution. (Para 48)

For preservation of liberty and prevention of tyranny it is absolutely essential to vest separate powers in three different organs. The separation of powers between Legislature, Executive and the Judiciary constitutes one of the basic features of the Constitution. (Paras 64 and 63)

b Constitutional amendments are subject to limitations and if the question of limitation is to be decided by Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. The authority to enact law and decide the legality of the limitations cannot vest in one organ. The validity of the limitation on the rights in Part III can only be examined by another independent organ, namely, the judiciary. (Para 144)

c The role of the judiciary is to protect fundamental rights. A modern democracy is based on the twin principles of majority rule and the need to protect fundamental rights. It is job of the judiciary to balance the principles ensuring that the Government on the basis of number does not override fundamental rights. Judiciary is the best institution to protect fundamental rights, given its independent nature and also because it involves interpretation based on the assessment of values besides textual interpretation. It enables application of the principles of justice and law. Realising that it is necessary to secure the enforcement of the fundamental rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts. After enunciation of the basic structure doctrine, full judicial review is an integral part of the constitutional scheme. The jurisdiction so conferred on the High Courts and the Supreme Court is a part of inviolable basic structure of the Constitution of India. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. (Paras 33, 46, 130, 136 and 107)

e The jurisdiction conferred on the Supreme Court by Article 32 is an important and integral part of the basic structure of the Constitution of India and no Act of Parliament can abrogate it or take it away except by way of impermissible erosion of fundamental principles of the constitutional scheme. (Para 39)

f It is the duty of the Supreme Court to uphold the constitutional values and enforce constitutional limitations as the ultimate interpreter of the Constitution. (Para 41)

g Articles 14, 19, 21 represent the foundational values which form the basis of the rule of law. These are the principles of constitutionality which form the basis of judicial review apart from the rule of law and separation of powers. If in future, judicial review was to be abolished by a constitutional amendment, as Lord Steyn says, the principle of parliamentary sovereignty even in England would require a relook. This is how the law has developed in England over the years. It is in such cases that doctrine of basic structure as propounded in *Kesavananda* has to apply. (Para 48)

h Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts is intimately

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connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary. (Para 129)

Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1; *Special Reference No. 1 of 1964*, AIR 1965 SC 745; *S.R. Bommai v. Union of India*, (1994) 3 SCC 1, followed

Waman Rao v. Union of India, (1981) 2 SCC 362, relied on

L. Chandra Kumar v. Union of India, (1997) 3 SCC 261 : 1997 SCC (L&S) 577; *State of Madras v. V.G. Row*, AIR 1952 SC 196 : 1952 SCR 597 : 1952 Cri LJ 966; *Fertilizer Corp. Kamgar Union (Regd.) v. Union of India*, (1981) 1 SCC 568; *State of Rajasthan v. Union of India*, (1977) 3 SCC 592; *Krishna Swami v. Union of India*, (1992) 4 SCC 605; *Daryao v. State of U.P.*, AIR 1961 SC 1457 : (1962) 1 SCR 574, affirmed

The Federalist Nos. 47, 48, 51, 78; *Spirit of Laws* (Book XI, Chapter 6); Lord Steyn: *Democracy Through Law*, p. 131, relied on

ZS. Constitution of India — Arts. 368 and 31-B r/w Sch. IX — Constituent power and amending power — Distinction between, and nature and relative scope of, explained — Insertion of words “constituent power” in Art. 368 — Effect — Held, addition of words “constituent power” in Art. 368 does not change the nature of power under Art. 368 from that of being an amending power to a constituent power — Parliament did not become the original Constituent Assembly by addition of said words — It remains a Parliament under a controlled Constitution, and limitations of basic structure doctrine continue to apply to it — Constitutional Law

There is a distinction between the making of a Constitution by a Constituent Assembly which was not subject to restraints by any external authority as a plenary law-making power and a power to amend the Constitution, a derivative power derived from the Constitution and subject to the limitations imposed by the Constitution. No provision of the Constitution framed in exercise of plenary-law making power can be ultra vires because there is no touchstone outside the Constitution by which the validity of provision of the Constitution can be adjudged. This power of framing the Constitution has no limitations or constraints, it is primary power, a real plenary power. The power for amendment cannot be equated with such power of framing the Constitution. The amending power has to be within the Constitution and not outside it. It has constraints of the document viz. Constitution which creates it. This derivative power can be exercised within the four corners of what has been conferred on the body constituted, namely, Parliament. (Paras 54 and 118)

By addition of the words “constituent power” in Article 368, the amending body, namely, Parliament does not become the original Constituent Assembly. It remains a Parliament under a controlled Constitution. Even after the words “constituent power” are inserted in Article 368, the limitations of doctrine of basic structure would continue to apply to Parliament. It is on this premise that clauses (4) and (5) inserted in Article 368 by the 42nd Amendment were struck down in *Minerva Mills case*, (1980) 3 SCC 625. (Para 137)

Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1; *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625, relied on

H.M. Seervai: *Constitutional Law of India* (4th Edn.), relied on

ZT. Constitution (First Amendment) Act, 1951 — Object of

- The main object of the First Amendment to the Constitution was to fully
a secure the constitutional validity of zamindari abolition laws in general and certain specified Acts in particular and save those provisions from the dilatory litigation which resulted in holding up the implementation of the social reform measures affecting large number of people. (Para 10)

D-M/A/35617/C

Advocates who appeared in this case :

- b Goolam E. Vahanvati, Solicitor General, Gopal Subramaniam, Amarjit Singh and R. Mohan, Additional Solicitors General, Uday Holla, Advocate General, Raman, Additional Advocate General, F.S. Nariman, Harish N. Salve, Raju Ramchandran, Milind Sathe, A.S. Qureshi, A.S. Nambiar, K.M. Vijayan, Soli J. Sorabjee, T.R. Andhyarajina, R. Shunmugasundaram, Raj Jethmalani, Dushyant Dave, Ashok H. Desai and Jugalkishore Gilda, Senior Advocates [P.H. Parekh, Sailesh Mahintara, Sameer Parekh, E.R. Kumar, Subhash Sharma, Gopal Sankaranarayanan, Ms Sonali Basu Parekh, Nitin Thukral, Ms Rukhmini Bobde, Kush Chaturvedi, Rohan Thawani, Joseph Pookkatt, Ms Atreyee Majumdar, Ms Pooja Dhar, Nikhil Majithia, Saurabh Sinha, Rishab, Prashant Kumar, A.N. Bardiya, Ms Rachana Joshi Issar, A. Rasheed Qureshi, Banamali Sil, Sewa Ram, Jacob Mathew, P.K. Manohar, Anip Sachdev, Harin P. Raval, Huzefa Alunadi, Mohit Paul, Ms Meenakshi Grover, Ms Aparajita Singh, Ms Gayatri Goswami, Kamal Deep, Pawan Kumar, Tejveer Singh, Pradyuman Gohil, Arijit Prasad, Ravinder Aggarwal, K.V. Mohan, K.V. Balakrishnan, S.R. Setia, Ms Kiran Suri, Ms Madhumita Bhattacharjee, Avijit Bhattacharjee, M.A. Chinnasamy, J. John, K. Krishna Kumar, V.N. Subramaniam, A. Subba Rao, Hrishikesh Bactali, Devdatt Kamat, C.P. Sharma, Ms Mrinalini Sen, V.K. Verma, Ms Sushma Suri, P. Parmeswaran, Satyakam, R. Basant, V.G. Pragasam, S. Vallinayagam, Preetesh Kapur, Ashish Chugh, Anand Misra, Ardhendunathi Prasad, Ananth Srinivasan, Ms P.R. Mala, Sanjay R. Hegde, Anil K. Mishra, Vikram Yadav, Nashedhar, Tara Chandra Sharma, Ms Neelam Sharma, Rajeev Sharma, Ajay Sharma, Rupesh Kumar, Ramesh Singh, Ms Hemantika Wahi, Ms Shivangi, Ms Sumita Hazarika, Rutwik Panda, Ms Sadhana Sandhu, Ms Pinky Behera, Rathin Das, A. Subba Rao, A. Mariaputham, Ms Aruna Mathur (for Arputham, Aruna & Co.), A.V. Rangam, A. Ranganathan, Buddy A. Ranganathan, M.T. George, Parmanand Gaur, V. Krishna Murthy, M.A. Chinnasamy, V. Senthil Kumar, V.N. Subramaniam, Ms Kirti Mishra, E.C. Vidya Sagar, Sewa Ram, Jacob Mathew, P.K. Manohar, Ms A. Subhashini and V.R. Anumolu, Advocates] for the appearing parties.

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I.R. COELHO v. STATE OF T.N.

23

SUMMARY OF ARGUMENTS

- a I. Mr F.S. Nariman, Senior Advocate, on behalf of the petitioners
II. Mr Goolam E. Vahanvati, Solicitor General of India, for the Union of India
III. Mr Soli J. Sorabjee, Senior Advocate, on behalf of the State of Tamil Nadu
IV. Mr T.R. Andhyarujina, Senior Advocate, on behalf of the State of Tamil Nadu

I. Mr F.S. Nariman, Senior Advocate, on behalf of the petitioners

b Submissions on Article 31-B

1. The Constitution (First Amendment) Act, 1951 introducing Article 31-B with 13 items in the Ninth Schedule was—a *one-time measure*—and valid as a one-time measure:

- c (a) The marginal note to Article 31-A (*Saving of laws providing for acquisition of estates, etc.*) and the marginal note to Article 31-B (*Validation of certain Acts and regulations*) are to be contrasted.

- d (b) Article 31-B was obviously not intended as a general saving of laws which were to be enacted in the future; the language of Article 31-B also did not countenance adding more enactments in the Ninth Schedule (the words are "none of the Acts and regulations specified in the Ninth Schedule..."), the language is not "none of the Acts and regulations specified and to be specified in the Ninth Schedule". In *Sankari Prasad*¹ (1952) this has been emphasised (SCR at p. 108).

(c) The words "nor any of the provisions thereof" (i.e. of the Acts and regulations specified in the Ninth Schedule) "shall be deemed to be void or ever to have become void" were on account of important historic circumstances—noticed in the judgment in *Sajjan Singh*² (1965) (SCR at pp. 942-44; AIR at pp. 852-53, paras 10-14).

- e 2. The extension of this *one-time measure* by the Fourth and Seventeenth Amendment Acts which added Items 14 to 64 in the Ninth Schedule (without re-enacting or even mentioning Article 31-B) was tolerated on account of the circumstances stated in *Sankari Prasad*¹ (1952) and held to be valid in *Golak Nath*³ (1967):

- f (i) either on the basis of "earlier decisions of this Court" (Subba Rao, C.J., or
(ii) on the basis of "acquiescence for a long time" (Hidayatullah, J.).

- g 3. As a consequence of the majority decision in *Kesavananda Bharati*⁴ (that "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution") not only was there no further justification for making additions to the Ninth Schedule with a view to conferring a blanket protection on the laws included therein but the "device" of making valid what was void (by a deeming fiction—Article 31-B) was itself violative of one of the most basic features of our Constitution viz. judicial review by the courts which ordinarily enforced fundamental rights (viz. the High Courts under Article 226 and the Supreme Court under Article 32). After *Kesavananda Bharati*⁴ (1973) it is no longer open to say [as was said by

1 *Sankari Prasad v. Union of India*, AIR 1951 SC 458 : 1952 SCR 89

h 2 *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 8-15

3 *Golak Nath v. State of Punjab*, AIR 1967 SC 16-13

4 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate, on behalf of the petitioners (*contd.*)

Patanjali Sastri, J. in *Sankari Prasad*¹ (AIR p. 464, para 15)—“But to make a law which contravenes the Constitution constitutionally valid is a matter of constitutional amendment, ...” a

The various constitutional amendments, by which additions were made to the Ninth Schedule on or after 24-4-1973, were “open to challenge on the ground that they or any one or more of them are beyond the constituent power of Parliament since they damage the basic or essential feature of the Constitution or its basic structure”; a proposition set out in the order dated 9-5-1980 in *Waman Rao*⁵, *Waman Rao v. Union of India*⁶, SCC at pp. 397-98. b

4. The “basic or essential features of the Constitution” did not exclude, and do not exclude, the provisions in the fundamental rights chapter [except property rights in Articles 19(1)(f) and 31]. As a matter of fact the basic or essential features would necessarily include Part III of the Constitution; though they would not be restricted only to Part III.

5. The impression that after the decision in *Kesavananda Bharati*⁴ (1973) the majority had held that fundamental rights were not “basic or essential features of the Constitution” was soon dispelled, when the “basic structure test” was applied to the provisions of the Thirty-ninth Amendment Act, 1975 (in *Indira Gandhi Election case*⁷ in 1975) where Khanna, J. (himself part of that Bench), being aware that his own somewhat ambiguous observations in *Kesavananda Bharati*⁴ had fuelled the impression that fundamental rights were not part of the basic structure: Khanna, J. had expressly clarified that what he meant was that property rights were never part of the basic structure, not that the other fundamental rights were not part of the basic structure. (*Indira Gandhi*⁷, SCC at p. 116 para 252) c

Application of the test (the basic structure test)

6. To speak of *something more* would introduce great uncertainty in the law—almost like the “Chancellor’s foot”; and it would lead to spiralling litigation if it were held that something more than what was contained in the fundamental rights chapter was required to be established when the constitutional validity of constitutional amendments placing ordinary laws in the Ninth Schedule (post-April 1973) was questioned. It is respectfully submitted that the test of “basic structure” would exclude property rights⁸ but not other *fundamental* rights—it may include also other aspects of “basic structure” such as “rule of law”, “separation of powers”, “secularism”, “federalism”, etc. e

7. It is respectfully submitted that permitting Acts put in the Ninth Schedule after April 1973 to be challenged also on the ground of violation of fundamental rights would not at all disable Parliament from making effective and valid constitutional amendments. The decision in *Minerva Mills*⁹ and in *Waman Rao*⁶ clearly establishes this: f

(a) In *Minerva Mills*⁹ (1980) for instance, the Court expressly struck down the extension of Article 31-C into the entire field of directive principles [not g

⁵ *Waman Rao v. Union of India*, (1980) 3 SCC 587

⁶ (1981) 2 SCC 362

⁷ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

⁸ No longer in the fundamental rights chapter since the Constitution (Forty-fourth Amendment) Act, 1978 (w.e.f. June 1979). h

⁹ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

Summary of Arguments

I. Mr E.S. Nariman, Senior Advocate, on behalf of the petitioners (*contd.*)

a restricted to only Articles 39(b) and (c)] on the ground that such extension disturbed the balance in the Constitution—a balance which permits fundamental rights to be so amended as to conform with one or another of the principles mentioned in Part IV but not so as to completely override the same; by contrast Article 31-C as originally enacted—and limited only to Articles 39(b) and (c) (25th Amendment) was expressly upheld in *Kesavananda*¹ (1973) (except the latter part making the legislative declaration final and beyond judicial review).

b (b) In *Waman Rao*⁵ (1980) the Court unanimously upheld the validity of Article 31-A although it took away fundamental rights under Articles 14 and 19 from individuals whose rights under those articles were challenged in respect of specified type of laws. This was in the context of the larger good e.g. for implementing programme of agrarian reform (see *Waman Rao*⁶, SCC at pp. 378-84). Article 31-A had sufficient guidelines and did not exclude judicial review of the courts (which enforced fundamental rights)—hence the constitutional validity of Article 31-A was upheld.

c It is respectfully submitted that the continued invocation of Article 31-B merely by placing further Acts in the Ninth Schedule post-April 1973 would lead to the impossibility of any effective judicial review—simply because there would be no parameters on the basis of which the validity of the constitutional amendments could be tested—since Article 31-B contemplates *any* laws whether of the State Legislatures or of Parliament which Parliament by a 2/3rd majority may choose to place in the Ninth Schedule.

d 8. After more than 50 years of the working of our Constitution (and after deletion of property rights from the fundamental rights chapter), it is respectfully submitted that the power of Parliament and of the State Legislatures to make laws only in conformity with fundamental rights, and not in contravention of them, should be held by Your Lordships to be a part of the basic feature or framework of the Constitution. As to whether a particular constitutional amendment damages or destroys a basic feature has to be judged on some higher principle—a balancing of individual rights against societal rights, for example—which can be judicially scrutinised by the court—by the same court which is empowered to enforce fundamental rights. It is on this principle that the validity of Article 31-A was upheld by the Court in *Waman Rao*⁵ (1980); denying the benefit to individuals of their fundamental right of equality under Article 14 in agrarian reform legislation which conforms to the principle of agrarian reform, such as distribution of lands to the landless, etc., has been upheld on the larger concept of equality when applied to the interests of society as a whole, as opposed to individual interests. In other words, the *salus populi est suprema lex principle* (*Broom's Legal Maxims*, 7th Edn., p. 1) "regard for the public welfare is the highest law"; "public welfare" being judged initially by those who framed the laws, and judged ultimately by those whose constitutional duty it is to interpret them.

e f g 9. In the reference order reported in *I.R. Coelho v. State of T.N.*¹⁰ the specific question referred to this Hon'ble Bench of nine Judges is "whether a provision of an Act which has already been struck down by this Hon'ble Court could or could not be validly inserted in the Ninth Schedule". The questions have been framed in two parts viz: (SCC p. 582, para 1)

h

¹⁰ (1999) 7 SCC 580

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate, on behalf of the petitioners (contd.)

"(1) Judicial review is a basic feature of the Constitution; to insert in the Ninth Schedule an Act which, or part of which, has been struck down as unconstitutional in exercise of the power of judicial review is to destroy or damage the basic structure of the Constitution. a

(2) To insert in the Ninth Schedule after 24-4-1973, an Act which, or part of which, has been struck down as being violative of the fundamental rights conferred by Part III of the Constitution is to destroy or damage its basic structure." b

It is respectfully submitted that judicial review being a basic feature of the Constitution, it should be held that to insert in the Ninth Schedule after 24-4-1973 an Act which, or a part of which, has been struck down as unconstitutional in exercise of the power of judicial review would *per se* destroy or damage the basic structure of the Constitution.

10. It should also be held by this Hon'ble Court that to insert in the Ninth Schedule after 24-4-1973 an Act which, or a part of which has been struck down as being violative of fundamental rights conferred by Part III of the Constitution, would also *per se* destroy or damage the basic structure of the Constitution. c

The supremacy of the Constitution has been stated to be a basic feature of the Constitution: its relevance to Coelho case

(A) *Kesavananda Bharati*¹ (Sikri, C.J.), SCC p. 366, para 292 d

(B) *State of Rajasthan v. Union of India*¹¹ (Beg, J.), SCC para 49

(C) *Indira Gandhi v. Raj Narain*⁷ (Beg, J.), SCC para 521, p. 197 and paras 571-74, pp. 217-18.

11. The doctrine of basic structure can be meaningful only if its applicability is with reference to concepts. Apart from the question whether any fundamental rights constitute a basic feature of the Constitution, Part III in its totality codifies the concept of fundamental rights—it establishes the supremacy of the Constitution. Part III itself is undoubtedly a basic feature of the Constitution. The effect of Article 31-B and the Ninth Schedule is to bring into existence a Constitution *without* Part III insofar as the Ninth Schedule Acts are concerned. The Constitution without Part III is basically different from the Constitution of India, as conceived and promulgated. Article 368 does not confer constituent power on Parliament to make a different Constitution—at least not after 24-4-1973. e

12. In *Coelho case*¹⁰ the object of the Thirty-fourth Amendment Act (Entry 80) is to declare as valid what the highest court of the land had pronounced to be unconstitutional and invalid viz. Section 3 of the Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 — *Balmadies*¹² (SCC at p. 150, para 22) thereby impairing or destroying not only judicial review but also the supremacy of the Constitution. There can be no doubt that supremacy of the Constitution as a basic feature is achieved and maintained only by judicial review, namely, the power of the courts to uphold the supremacy of the Constitution by deciding whether laws enacted are repugnant to Part III or not. Hence it is that, supremacy of the Constitution and judicial review are both basic features of our written Constitution. f

11 (1977) 3 SCC 592

12 *Balmadies Plantations Ltd. v. State of T.N.*, (1972) 2 SCC 133

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate, on behalf of the petitioners (contd.)

a Consequences

13. If laws which are struck down as violating fundamental rights can also be put in the Ninth Schedule, even after 24-4-1973¹³ there is an end to all our freedoms. For instance, take freedom of the press. Laws which have been struck down as violating Article 19(1)(a) will get full force and vigour if included in the Ninth Schedule. The old newsprint policy—struck down in *Bennett Coleman*¹⁴ (4:1) as violative of Article 19(1)(a) of the Constitution could be revived by enacting a law to that effect and putting it in the Ninth Schedule; it will be recalled that the old newsprint policy was aimed at the major print media which criticised the Government.

b

14. To take another instance, after the clamour of election laws to be more transparent, all political parties agreed to the Representation of the People (Third Amendment) Act, 2002 being enacted which however included Section 33-B quoted below:

c

"33-B. Candidate to furnish information only under the Act and the rules.—Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder."

d

The judgment referred to was *Union of India v. Assn. for Democratic Reforms*¹⁵.

15. Article 33-B was struck down by this Court in *PUCL v. Union of India*¹⁶ as violating Article 19(1)(a) and also because it overrode a prior judgment of the Court (without attempting to remove the defect). Since all political parties had agreed on the formulation of Section 33-B, it is possible to imagine a constitutional Amendment including Section 33-B of the Representation of the People (Third Amendment) Act, 2002 in the Ninth Schedule; a "struck down" provision—Section 33-B—would then revive if the contention of the respondents in this reference were to prevail.

e

Conclusions

16. (1) The "basic structure" doctrine has been an evolutionary process—its foundation was laid (at first only tentatively) in *Sajjan Singh*² (1965) by Mudholkar, J., SCR at pp. 966, 967 and 969 F. It was then authoritatively enunciated in *Kesavananda*¹, SCC at p. 1007 ("Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution"): "Authoritatively" not merely because the majority of Judges (7:6) said that "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution", but additionally, because the doctrine was actually applied in the same case when striking down the last part of Article 31-C (Twenty-fifth

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¹³ *State of Maharashtra v. Madhavrao Damodar Patilchand*, (1968) 3 SCR 712 (7 Judges) and in *Jaganmuth v. Authorised Officer*, (1971) 2 SCC 893 (7 Judges), both decisions before 24-4-1973 this Hon'ble Court has held that: such Acts even if void or inoperative at the time when enacted by reason of infringement of Article 13(2) assumed full force and vigour from their respective dates of their enactment after inclusion in the Ninth Schedule.

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¹⁴ *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788

¹⁵ (2002) 5 SCC 294

¹⁶ (2003) 4 SCC 399

Summary of Arguments

I. Mr ES. Nariman, Senior Advocate, on behalf of the petitioners (*contd.*)

Amendment Act, 1971)—each of the Judges so struck it down on the basis of different facets of the “basic structure”. *Sikri, C.J., Kesavananda¹*, SCC at p. 405, para 475(g); *Shelat, J. and Grover, J.* in para 608(6) at p. 463; *Hegde and Mukherjea, JJ.* in para 744(7) at p. 512; *Khanna, J.* in para 1537(XIV) from pp. 824 and 825; and *Jaganmohan Reddy, J.* in para 1205 at p. 662. a

(2) The constitutional doctrine was accepted in *Waman Rao^{5,6}* by Chandrachud, C.J. who spoke for the Bench of 5 Judges, though it was he who had initially dissociated himself from that doctrine (minority opinion in *Kesavananda Bharati case¹*). b

(3) The approach to the enactments put in the Ninth Schedule after 24-4-1973 has been uniform and in line with the last sentence of para 51, pp. 397-98 in *Waman Rao case⁶* viz.

“The various constitutional Amendments by which additions were made to the Ninth Schedule on or after 24-4-1973, will be valid only if they do not damage or destroy the basic structure of the Constitution.” c

(4) After *Kesavananda Bharati case¹* a Bench of thirteen Judges were again assembled on 10-11-1975 after the Union of India (and the Attorney General) had made an application on 1-9-1975 for reconsideration.

H.M. Seervai in the fourth edition of his *Constitutional Law of India* (Vol. 11) at p. 1957 comments:

“On 20-10-1975, the Court indicated that on 10-11-1975 the petitions would be heard by a Bench of thirteen Judges for considering: (1) whether the power of amendment of the Constitution was restricted by the theory of basic structure and framework as propounded in *Kesavananda case¹* and (2) whether *Bank Nationalisation case¹⁷* was correctly decided. However, before the hearing could take place on 10 November the judgment of five Judges in the Election case, (*Indira Gandhi v. Raj Narain⁷*) four of them clearly affirming the doctrine of the basic structure, had been delivered. On 10-11-1975 when a large number of writ petitions were placed before a Bench of thirteen Judges an objection was raised to the Union Government’s application for a reconsideration of *Kesavananda case¹* on the theory of the basic structure and framework of the Constitution on the ground that no case had been made out for such reconsideration. Arguments were heard for two days but then on 12-11-1975, as soon as the Court reassembled, Ray, C.J., informed the parties that the Bench had been dissolved, and the specified matter would be posted for hearing before the Constitution Bench which, after considering the matter might, if it thought necessary, refer the matter to a larger Bench.” d

Seervai then adds:

“This sequence of events would suggest that Ray, C.J., realised, before 10-11-1975, that his brother Judges in the Election case were not likely to depart from the theory of the basic structure; and it would also suggest that the two days’ hearing before the Bench of thirteen Judges satisfied him that the doctrine of the basic structure would not be reconsidered by the present Bench.” e

(5) Subsequent legislative history noted below shows that when an attempt was made by the Government of the day to introduce amendments in Article 368 amplifying some aspects of the “basic structure”, the attempt was not successful. f

¹⁷ *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248

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Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate, on behalf of the petitioners (*contd.*)

- a* (A) Bill 88 of 1978, titled the Constitution (Forty-fifth Amendment) Bill, 1978 was introduced in the Lok Sabha on 15-5-1978. The Bill sought to amend various articles, including Article 368 of the Constitution—after clause (2) of Article 368 the following proviso was sought to be inserted viz.
- Provided further that if such amendment—
- b* (a) seeks to make any change which, if made, would have the effect of—
- (i) impairing the secular or democratic character of this Constitution; or
- (ii) abridging or taking away the rights of citizens under Part III; or
- c* (iii) prejudicing or impeding free and fair elections to the House of the People or the Legislative Assemblies of States on the basis of adult suffrage; or
- (iv) compromising the independence of the judiciary; or
- (b) seeks to amend this proviso the amendment shall also require to be approved by the people of India at a referendum under clause (4); and for clauses (4) and (5)—inserted by the Forty-second Amendment Act, the following clauses were proposed to be substituted:
- d* “(4) The referendum for the purpose of seeking the approval of the people of India for any amendment of the nature referred to in the second proviso to clause (2) shall be through a poll, and
- (i) all persons who are for the time being eligible to be voters under Article 326 at elections to the House of the People shall be entitled to vote at such poll; and
- e* (ii) any such amendment shall be deemed to have been approved by the people of India if such amendment is approved by a majority of the voters voting at such poll and the voters voting at such poll constitute not less than fifty-one per cent of the voters entitled to vote at such poll.
- f* (5) The superintendence, direction and control of the preparation of the rolls of voters for, and the conduct of every referendum under this article shall vest in the Election Commission and the result of such referendum as declared by the Election Commission shall not be called in question in any court.
- (6) Subject to the provisions of clauses (4) and (5), Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with referenda under this article, including the preparation of the rolls of voters.”
- g* (B) Bill 88 of 1978 was considered by the Lok Sabha on 7-8-1978 to 12-8-1978 and 21-8-1978 to 23-8-1978, and as amended passed on 23-8-1978.
- (i) (Article 368) = Clause 45 (Lok Sabha Debates dated 23-8-1978) p=43 to 54
- h* “That clause 45 stands part of the Bill.”

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I. Mr F.S. Nariman, Senior Advocate, on behalf of the petitioners (*contd.*)

Votes: Ayes — 314 Noes — 88

Note.—The motion was carried by a majority of the total membership of the House and by a majority of not less than two-thirds of the Members present and voting. a

(ii) *Lok Sabha Debates 23-8-1978 (p=107 to 116)*

"The whole Bill as amended be passed."

Votes: Ayes — 355 Noes — NIL

Note.—The motion was carried by a majority and was adopted. b

(C) Bill 88 of 1978 was considered by the Rajya Sabha from 28-8-1978 to 31-8-1978 and passed with amendments on 31st August.

(i) *Clause 45 (amendment of Article 368) p=270 to 281 of Debates*

"That clause 45 stands part of the Bill."

Votes: Ayes — 91 Noes — 86 c

Note.—Motion was declared *not* carried by the requisite 2/3rd majority of the Members present and voting.

(ii) "That the Bill, as amended, be passed!"

Votes: Ayes — 182 Noes — 1

Note.—Motion carried by a 2/3rd majority.

(D) The Bill as amended by the Rajya Sabha was again considered by the Lok Sabha on 6-12-1978 and 7-12-1978: Amendments made by the Rajya Sabha were agreed to by the Lok Sabha on 7-12-1978. The Bill as amended was thus passed by the Lok Sabha on 7-12-1978. d

(i) *Re: Clause 45: on 7-12-1978 (Lok Sabha Debates 7-12-1978) p=304 to 314 the motion was put to vote:*

"That at pp. 13 and 14, clause 45 be deleted." e

Votes: Ayes — 342 Noes — 41

Note.—Motion was carried with 2/3rd majority and adopted.

(ii) *Entire Bill was passed on 7-12-1978 p=324 to 333*

"That the Bill as amended by the amendments agreed to be passed."

Votes: Ayes — 357 Noes — 1 f

Note.—Motion was carried by a majority of 2/3rd and adopted.

Hence, there was no amendment to Article 368 as proposed in Bill 88 of 1978 and Article 368 [as amended by Section 55 of the Constitution (Forty-second Amendment) Act by inserting clauses (4) and (5)] remained unaltered.¹⁸

(6) Parliament has never attempted to reformulate any facets of basic structure since then and has continuously accepted that it is for the judiciary to explain and expound on a case-to-case basis. g

(7) In *Kesavananda Bharati*¹ (1973) itself, the latter part of Article 31-C introduced by the Constitution (Twenty-fifth Amendment) Act, 1971 was struck

¹⁸ Clauses (4) and (5) were struck down as violating the basic structure in the first *Minerva Mills* case,² (1980) 3 SCC 625. h

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate, on behalf of the petitioners (contd.)

- a down inter alia on one aspect of the "basic features" mentioned by two Judges viz. that it violated judicial review [Khanna, J. and Jaganmohan Reddy, J. at para 1537(xiv), p. 825 and para 1205, p. 662 respectively]. Courts have in subsequent decisions consistently held that judicial review of constitutional Amendments through the Court's scrutiny under Article 226 and Article 136 is one of the basic features of the Constitution (see *L. Chandra Kumar case*¹⁹).
- b (8) It is submitted that Article 31-B which has been consistently held to be a "constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part III of the Constitution" (see *N.B. Jeejeebhoy v. Assistant Collector, Thane*²⁰) can no longer survive after the fruition of the concept of judicial review of constitutional Amendment—because laws enacted either by Parliament or the State Legislatures which take away or abridge any of the fundamental rights of Part III of the Constitution are expressly declared void under Article 13, and the concept of "supremacy of the Constitution" (itself a basic feature²¹) precludes the notion of two sets of laws—one which is subject to court's scrutiny for violation of fundamental rights under Articles 32, 226 or 136 and another set of laws which the High Courts and the Supreme Court are not permitted to scrutinise only because of the "constitutional device" by which they are placed in the Ninth Schedule. Article 31-B has now become totally otiose and cannot be invoked by Parliament to make void laws valid (void because they infringe all or any of the rights mentioned in Part III). Khanna, J. has explained and clarified in *Indira Gandhi v. Raj Narain*⁷ (1975) that he did not say in *Kesavananda*⁴ (1973) that "fundamental rights are not a part of the basic structure" (paras 251-52, pp. 114-16 in *Indira Gandhi case*⁷). He has explained how his observation in *Kesavananda*⁴ militates against the (ill-founded) contention that "according to my judgment fundamental rights are not a part of the basic structure of the Constitution".
- c
- d
- e (9) In the first case dealing with Article 31-B (*Sankari Prasad v. Union of India*⁴) Patanjali Sastri, J. said at p. 109 "to make a law which contravenes the Constitution constitutionally valid is a matter of constitutional Amendment". No longer. After the basic structure theory became part of Indian constitutional law—as from 24-4-1973—it is impermissible to make a law which contravenes the Constitution, constitutionally valid—if it violates any of the basic features of the Constitution.
- f

**II. Mr Goolam E. Vahanvati, Solicitor General of India,
for the Union of India**

Scope and object of Article 31-B of the Constitution

- g 1. Article 31-A as well as Article 31-B were incorporated by way of the Constitution (First Amendment) Act, 1951. The object and purpose of the Constitution (First Amendment) Act, 1951, as is discernible from the Parliamentary Debates, is to achieve the constitutional objectives of social equality. Directive principles of State policy points out the way in which the State should achieve this goal. Part III of the Constitution also guarantees fundamental rights. Both are
- h
- 19 *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261 : 1997 SCC (L&S) 577
- 20 See *N.B. Jeejeebhoy v. Asstt. Collector, Thana Prant*, AIR 1965 SC 1096 : (1965) 1 SCR 636 at pp. 618 II-649 A (Subba Rao, C.J. for the Court); specifically cited by Khanna, J. in *Kesavananda Bharati*⁴, SCC at pp. 822-23, para 1536.
- 21 See Basu, *Shorter Constitution of India*, 13th Edn. at p. 1651.

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important. The directive principles of State policy represent a dynamic move towards a certain objective. The fundamental rights appears to be static. Both are fundamental and constitute the core. However, it is conceivable that dynamic movement and static influences collide. Therefore, a legislature must have the power to bring about the broader social equality even if it be at the expense of particular individual freedoms. Otherwise, the State fails to do what it has been commanded to do by this Constitution. This does not mean that the Constitution is changed; in fact it is made stronger. This merely gives effect to the real intentions of the framers of the Constitution, and to the wording of the Constitution. a

Interaction between Article 31-A and Article 31-B

2. The expression, "without prejudice to the generality of the provisions contained in Article 31-A" in Article 31-B, indicates that the Acts and regulations specified in the Ninth Schedule would have the immunity even if they did not attract Article 31-A of the Constitution. If every Act in the Ninth Schedule would be covered by Article 31-A, this article would become redundant. Article 31-B is not governed by Article 31-A. See *N.B. Jeejeebhoy v. Asstt. Collector, Thana Prant*²⁰, (5 Judges); *State of Bihar v. Kameshwar Singh*²² (5 Judges); *Kesavananda Bharati v. State of Kerala*¹ (13 Judges). (Paras 463, 608, 742-43, 1062, 1211, 1332, 1536, 1782, 1851, 1992, 2136) c

3. There are significant dissimilarities in the device or mechanism created by Articles 31-A and 31-B. Article 31-A enables the passing of laws of the description mentioned in clauses (a) to (e), in violation of the guarantees afforded by Articles 14 and 19. Parliament is not required, in the exercise of its constituent power or otherwise, to undertake an examination of the laws which are to receive the protection of Article 31-A. In other words, when a competent legislature passes a law within the purview of clauses (a) to (e), it automatically receives the protection of Article 31-A, with the result that the law cannot be challenged on the ground of its violation of Articles 14 and 19. Insofar as Article 31-B is concerned, it does not define the category of laws which are to receive its protection, and secondly, going little further than Article 31-A, it affords protection to Schedule laws against all the provisions of Part III of the Constitution. No Act can be placed in the Ninth Schedule except by Parliament and since the Ninth Schedule is a part of the Constitution, no additions or alterations can be made therein without complying with the restrictive provisions governing amendments to the Constitution. Thus, Article 31-B read with the Ninth Schedule provides what is generally described as, a protective umbrella to all Acts which are included in the Schedule, no matter of what character, kind or category they may be. Putting it briefly, whereas Article 31-A protects laws of a defined category, Article 31-B empowers Parliament to include in the Ninth Schedule such laws as it considers fit and proper to include therein. See *Waman Rao v. Union of India*⁶ (5 Judges). d

4. There is no warrant or justification in restricting the laws to be protected by Article 31-B to only the laws saved by Article 31-A. In this regard, see the holding of this Hon'ble Court in *Waman Rao v. Union of India*⁶ (5 Judges), SCC at p. 396 through the learned Chief Justice Chandrachud (for himself, Tulzapurkar and Sen, JJ.). Attention is invited also to the judgment of this Hon'ble Court in *Godavari Sugar Mills v. S.B. Kamble*²³ (3 Judges), SCC at p. 706 (per Khanna, J.) e

22 AIR 1952 SC 252 : 1952 SCR 889

23 (1975) 1 SCC 696

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a Article 31-B as a validating and curing provision

5. It is well settled that a validating statute can render a judgment of the court ineffective. It is also well settled that a validating statute has to remove the basis on which the judgment was rendered. [See *Prithvi Cotton Mills v. Broach Borough Municipality*²⁴ (5 Judges), SCC at para 4]. It is respectfully submitted that Article 31-B is a constitutional mechanism for validating statutes which have been struck down on the ground of violation of Part III of the Constitution. See *Sasanka Sekhar Maity v. Union of India*²⁵ (5 Judges).

b 6. When a statute is included in the Ninth Schedule, the vice or the defect of unconstitutionality of the legislation on the ground of infringement of fundamental rights is cured. Article 31-B itself acts as a deeming validating provision. It is submitted that there is no necessity of a separate validating Act taking away the basis of the judgment before the Act is put in the Ninth Schedule. The very factum of inclusion in the Ninth Schedule of the Act cures the Act of the defect/basis which is pointed out in the judgment holding the legislation to be unconstitutional. In this context, the words "shall be deemed to be void or ever to have become void" are relevant and significant.

c 7. It is submitted that a legislation which has been struck down on the ground of violation of fundamental rights is cured of the defect/vice by its inclusion in the Ninth Schedule by a deeming fiction as if Part III of the Constitution was never available as a challenge to such statute. Article 31-B creates a sphere whereby legislation or regulation provided in the Ninth Schedule would not attract the application of Part III of the Constitution.

d 8. This Hon'ble Court in *Prag Ice & Oil Mills v. Union of India*²⁶ (7 Judges) through Chandrachud, J. (for himself, Bhagwati, Fazal Ali, Shinghal and Jaswant Singh, JJ.) held that when an enactment is challenged on the ground of violation of fundamental rights, and the defence of the State is that the legislation is included in the Ninth Schedule, the narrow question to which one must address oneself is whether the impugned law is specified in that Schedule. If it is, the provisions of Article 31-B would be attracted and the challenge has to fail without any further inquiry. See also *Standard Chartered Bank v. Directorate of Enforcement*²⁷ (3 Judges), SCC paras 17 & 18.

e Amending power and Article 31-B

9. This Hon'ble Court in *Golak Nath v. State of Punjab*³ (11 Judges) through Bachawat, J. held as under:

f "Article 31-B retrospectively validated the Acts mentioned in the Ninth Schedule notwithstanding any judgment, decree or order of any court though they take away or abridge the rights conferred by Part III. It is said that the Acts are stillborn and cannot be validated. But by force of Article 31-B the Acts are deemed never to have become void and must be regarded as valid from their inception. The power to amend the Constitution carries with it the power to make a retrospective amendment. It is said that Article 31-B amends Article 141

g 24 (1969) 2 SCC 283 : (1970) 1 SCR 388

h 25 (1980) 4 SCC 716

26 (1978) 3 SCC 459

27 (2006) 4 SCC 278 : (2006) 2 SCC (Cri) 221

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at it alters the law declared by this Court on the validity of the Acts. This argument is baseless. As the Constitution is amended retrospectively, the basis upon which the judgments of this Court were pronounced no longer exists, and the law declared by this Court can have no application. It is said that Article 31-B is a law with respect to land and other matters within the competence of the State Legislature, and Parliament has no power to enact such a law. The argument is based on a misconception. Parliament has not passed any of the Acts mentioned in the Ninth Schedule. Article 31-B removed the constitutional bar on the making of the Acts. Only Parliament could remove the bar by the Constitution amendment. It has done so by Article 31-B. Parliament could amend each article in Part III separately and provide that the Acts would be protected from attack under each article. Instead of amending each article separately, Parliament has by Article 31-B made a comprehensive amendment of all the articles by providing that the Acts shall not be deemed to be void on the ground that they are inconsistent with any of them. The Acts as they stood on the date of the Constitution amendments are validated. By the last part of Article 31-B the competent legislatures will continue to retain the power to repeal or amend the Acts. The subsequent repeals and amendments are not validated. If in future the competent legislature passes a repealing or amending Act which is inconsistent with Part III it will be void." (emphasis supplied)

This principle of law laid down by Bachawat, J. holds good till now. This principle has never been overruled.

Mere infringement of a fundamental right may not violate the basic structure

10. The core issue which arises for consideration is the nature of the challenge available to test the validity of constitutional amendments, inserting and making additional entries in the Ninth Schedule. It is submitted that this Hon'ble Court in *Kesavananda Bharati case*¹ held by a majority that the power to amend the Constitution has an inherent limitation i.e. it cannot amend, alter or destroy the basic structure of the Constitution. Therefore, an amendment to the Constitution cannot be done when the amendment violates the basic structure of the Constitution. This is an inherent limitation of the powers provided under Article 368 of the Constitution.

11. It is submitted that when a constitutional amendment Act inserts a legislation into the Ninth Schedule, the Act which is inserted by the Constitution Amendment Act still remains an ordinary legislation and does not partake the character of a constitutional provision. Mathew, J. in *Indira Gandhi Nehru case*², (SCC para 358) considered the effect of inserting a legislation into the Ninth Schedule.

12. The question which then arises is the limits of judicial review while testing a constitutional amendment inserting an act in the Ninth Schedule. It is submitted that by virtue of the law laid down in *Kesavananda Bharati case*³ the constitutional amendment would be ultra vires the amending power conferred by Article 368, if it comprehends within it the damaging or destruction of the basic structure. Therefore, a constitutional amendment which incorporates a legislation in the Ninth Schedule has to be tested on the ground whether it violates the basic structure of the Constitution. In the event, the constitutional amendment Act incorporates an Act which violates the basic structure then such an amendment would be ultra vires the powers provided by Article 368 and therefore invalid and the protection provided under Article 31-B would not be available.

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II. Mr Goolam E. Vahanvati, Solicitor General of India, for the Union of India (contd.)

- a 13. The question which then arises is what is the test of judicial review of such legislation inserted in the Ninth Schedule. It is respectfully submitted that challenge to such a legislation incorporated by a constitutional amendment in the Ninth Schedule on the ground of basic structure is limited to the extent that the fundamental rights which the legislation takes away, damages or destroys the basic structure of the Constitution. It is therefore submitted that the correct approach while testing a legislation incorporated in the Ninth Schedule on the ground of basic structure was formulated by Mathew, J. in *Indira Gandhi Nehru case*⁷, (SCC para 358)

"The utmost that can be said is as I indicated, that even after putting them in the Ninth Schedule their provisions would be open to challenge on the ground that they took away or abrogated all or any of the fundamental rights and therefore damaged or destroyed the basic structure if the fundamental rights or right taken away or abrogated constitutes a basic structure."

- c It is submitted that an Act which is inserted in the Ninth Schedule cannot be tested on the broad parameters of basic structure doctrine except as indicated above.

- d 14. There is a vital difference between the invalidation of legislation because of infringement of Article 14 of the Constitution and invalidation of a constitutional amendment on account of the total destruction or annihilation of the concept of equality, which would form part of the basic feature. It is therefore submitted that mere curtailment of a fundamental right might not offend the basic structure of the Constitution. In this regard, see *Bhim Singhji v. Union of India*²⁸ (5 Judges). See also *R.S. Garg v. State of U.P.*²⁹ (2 Judges).

Judicial review and basic structure

15. Though in *L. Chandra Kumar v. Union of India*¹⁹ (7 Judges) this Hon'ble Court concluded that,

- e "It appears that this Court has always considered the power of judicial review vested in the High Courts and in this Court, under Article 226 and Article 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts to be integral to our constitutional scheme; the fact remains that under the Constitution itself there are several articles which exclude judicial review."

- f [See for instance, Article 33, Article 74(2), Article 103(1), Article 105(2), Article 122, Article 136(2), Article 163(3), Article 194(2), Article 212, Article 262(2), Article 329-A and Article 363.]

- g 16. It is also necessary to note that there is a distinction between total exclusion of judicial review and a validation of an Act which has been struck down on the principles applicable to ordinary legislation, namely, violation of Part III of the Constitution or legislative competence. See the observations of Ray, C.J. in *Indira Nehru Gandhi v. Raj Narain*⁷ (5 Judges), SCC para 138:

17. The fact that Article 31-A and Article 31-C which provide for protection from the challenge to Articles 14 and 19, have been upheld so that this does not amount to an exclusion of judicial review.

- h 18. This apart, though the judgment in *Indira Gandhi case*⁷ has been extensively quoted in *L. Chandra Kumar*¹⁹ the conclusion drawn therein namely that judicial

²⁸ (1981) 1 SCC 166

²⁹ (2006) 6 SCC 430 : 2006 SCC (I.&S) 1388

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review of election disputes is not a compulsion and this is part of a constitutional scheme, has not been doubted. a

19. It is well settled that judicial review of statutes, which are afforded the protection under Article 31-B, is not completely barred. The only area where such Acts get immunity is from the mere infraction of rights guaranteed under Part III of the Constitution. One of the areas where judicial review can be exercised relates to compliance with the form and procedure and requirements prescribed by Article 368. b

20. The other recognised area where Acts under the Ninth Schedule can be judicially reviewed is in relation to the question of legislative competence. See *State of Bihar v. Kameshwar Singh*²² (5 Judges). c

21. Judicial review of Acts falling under the Ninth Schedule is also permissible in a case where an Act which is put in the Ninth Schedule is amended, then the amended provision can be judicially reviewed on the touchstone of Article 13. The reason being that Article 31-B should be interpreted strictly. But even interpreting it strictly, the only requirement which is laid down by Article 31-B is that the Act should be specified in the Ninth Schedule. Therefore, in the absence of the amendment being specified in the Ninth Schedule the amendment cannot be protected for infringement of the rights under Part III of the Constitution. See *State of Maharashtra v. Madhavrao Damodar Patil*¹³ (7 Judges). This principle has been reiterated by this Hon'ble Court in *Ram Lal Gulabchand Shah v. State of Gujarat*³⁰ (7 Judges) and in *Sri Ram Ram Narain Medhi v. State of Bombay*³¹ (5 Judges). d

22. There is one more area where judicial review of Acts falling under the Ninth Schedule is permissible. After the law laid down by this Hon'ble Court in *Kesavananda Bharati*¹ the Acts which are inserted in the Ninth Schedule could be judicially reviewed if they violate the basic structure of the Constitution as stated hereinabove. This principle was laid down by this Hon'ble Court in *Waman Rao v. Union of India*⁶ (5 Judges). Chandrachud, C.J. (for himself and Krishna Iyer, Tulzapurkar and A.P. Sen, JJ.) held as under: e

"Thus, insofar as the validity of Article 31-B read with the Ninth Schedule is concerned, we hold that all Acts and regulations included in the Ninth Schedule prior to 24-4-1973 will receive the full protection of Article 31-B. Those laws and regulations will not be open to challenge on the ground that they are inconsistent with or take away or abridge any of the rights conferred by any of the provisions of Part III of the Constitution. Acts and regulations, which are or will be included in the Ninth Schedule on or after 24-4-1973 will not receive the protection of Article 31-B for the plain reason that in the face of the judgment in *Kesavananda Bharati*¹ there was no justification for making additions to the Ninth Schedule with a view to conferring a blanket protection on the laws included therein. The various constitutional amendments, by which additions were made to the Ninth Schedule on or after 24-4-1973, will be valid only if they do not damage or destroy the basic structure of the Constitution." f g

This test has been accepted by Bhagwati, J. [SCC para 64] in his partly dissenting opinion. This test has also been applied in various cases such as *Minerva Mills Ltd. v. Union of India*⁹ (5 Judges) as well as *Bhim Singhji v. Union of India*²⁸ (5 Judges). It is submitted that there is no inconsistencies in the law laid down by this Hon'ble h

30 AIR 1969 SC 168 : (1969) 1 SCR 42

31 AIR 1959 SC 459 : 1959 Supp (1) SCR 489

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- a Court in *Waman Rao*^{5,6} and the test laid down by this Hon'ble Court in the said case has been accepted in *Minerva Mills case*⁹ as well as *Bhumi Singhji case*²⁸. This test has also been applied in *Attorney General for India v. Amratlal Prajivandas*³² (9 Judges).

- b 23. It is submitted that the test for judicially reviewing the Acts cannot be on the basis of mere infringement of the rights guaranteed under Part III of the Constitution or the broad doctrine of basic structure of the Constitution. The correct test has to be that the Acts which are included in the Ninth Schedule can only be judicially reviewed only if they damage or destroy that part of the fundamental rights which forms a part of the basic structure. Any other view would make Article 31-B of the Constitution otiose and redundant.

24. The petitioners have proceeded on the basis of certain assumptions with reference to Article 31-B which need to be noticed and highlighted in the forefront:

- c (A) It has been submitted that Articles 31-A and 31-B are part of a common scheme. In this regard, reliance has been placed on the judgment of Bhagwati, J. in *Minerva Mills v. Union of India*⁹ (SCC para 91) in which it is stated that the Ninth Schedule of Article 31-B was not intended to include laws other than those covered by Article 31-A and that Articles 31-A and 31-B were intended to serve the same purpose of protecting the legislation falling within a certain category.

- d (B) It has been submitted that the scope and validity of Article 31-B must be judged having regard to the situation subsisting *after* the judgment in *Kesavananda Bharati v. State of Kerala*¹ and the introduction of the concept of basic structure and the basic features of the Constitution implying that Article 31-B and the Ninth Schedule did not fall for consideration in this judgment.

- e 25. It is respectfully submitted that the first assumption is erroneous in law. It ignores that the approach of Bhagwati, J. is in fact contrary to what judges in *Kesavananda Bharati case*¹ have expressly held. As set out hereinafter, the learned Judges in *Kesavananda Bharati*¹ expressly negated the arguments of Mr Palkhivala with regard to the interaction between Articles 31-A and 31-B and this is contrary to the approach of Bhagwati, J. in *Minerva Mills*⁹.

- f 26. It is submitted that the second assumption is equally fallacious in law since it ignores the observations of the Judges made in relation to Article 31-B and the 'Twenty-ninth Amendment in *Kesavananda Bharati case*¹. It will be demonstrated that all the Judges were fully alive to the consequences of the introduction of the basic structure doctrine, and responded to it.

Are fundamental rights unamendable?

- g 27. The submission of the petitioners that fundamental rights cannot be amended at all is not correct. None of the Judges who constituted the majority in *Kesavananda Bharati*¹ in relation to the basic structure doctrine have so stated.

Are all fundamental rights part of the basic structure?

- h 28. This leads to the next issue, namely, whether all fundamental rights are part of the essential feature or basic structure of the Constitution. The answer to this must be in the negative. The effect of overruling the law laid down in *Golak Nath case*³ in *Kesavananda Bharati case*¹ is that fundamental rights can be amended. If

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fundamental rights can be amended, fundamental rights cannot be said to be part of the basic structure, unless the nature of the amendment is such as which essentially destroys the nature and character of the Constitution. This depends on the nature of the right sought to be amended and the extent to which it is sought to be amended. a

29. It is submitted that a fundamental right may not be an essential feature or basic structure of the Constitution. This has been recognised in *Kesavananda Bharati case*⁴. In that case, the majority held that subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential feature. No part of a fundamental right can claim immunity from the amendatory process by being described as the essence or core of that right. b

30. It is also submitted that a particular fundamental right may not be a basic feature of the Constitution. For example, Article 19(1)(f) as well as Article 31 of the Constitution was deleted from Part III of the Constitution by the Constitution (Forty-fourth Amendment) Act, 1948. See *Raghunathrao Ganpatrao v. Union of India*³³ (5 Judges), *Indira Nehru Gandhi v. Raj Narain*⁷ (5 Judges) through Ray, C.J. (SCC at paras 53-54), Khanna, J. (at para 251), Mathew, J. (at paras 328-30 & 334) c

31. In this connection it is also important to note that all the Judges upheld the validity of the Twenty-fourth Amendment Act [which inserted Article 13(4) and Article 368(3)]. The effect of the said amendments is that the restriction under Article 13(2) was inapplicable to constitutional amendment. See Sikri, C.J. (paras 395-96), Shelat & Grover, JJ. (para 583), Hegde & Mukherjee, JJ. (paras 673 & 678), Ray, J. (para 1064), Jagannathan Reddy, J. (para 1162), Palekar, J. (paras 1318, 1333(3)), Khanna, J. (para 1510), Mathew, J. (para 1716), Beg, J. (para 1851), Dwivedi, J. (paras 1955, 1958), Chandrachud, J. (paras 2109, 2110). d

Is judicial review a part of basic structure?

32. It is really not necessary to consider whether judicial review is a part of the basic feature of the Constitution. In the present case, there is no total exclusion of judicial review. The Acts placed in the Ninth Schedule can be reviewed on the touchstone of whether they destroy the essential features of the Constitution. e

33. It is submitted that the test for judicially reviewing the Acts cannot be on the basis of mere infringement of the rights guaranteed under Part III of the Constitution. The correct test has to be that the Acts which are included in the Ninth Schedule if they damage or destroy that part of the fundamental rights which form a part of the basic structure. f

34. It is well settled that judicial review of statutes, which are afforded the protection under Article 31-B, is not completely barred. The only area where such Acts get immunity is from the mere infraction of rights guaranteed under Part III of the Constitution. Another area where judicial review can be exercised relates to compliance with the form and procedure and requirements prescribed by Article 368. g

35. Further, the question of legislative competence is always open. See *State of Bihar v. Kameshwar Singh*²² (5 Judges).

36. The amendments made to an Act specified in the Ninth Schedule is also amenable to judicial review. Judicial review of Acts falling under the Ninth Schedule is permissible in a case where an Act which is put in the Ninth Schedule is amended. h

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- a** The amended provision can be judicially reviewed on the touchstone of Article 13. The reason being that Article 31-B should be interpreted strictly. The only requirement which is laid down by Article 31-B is that the Act should be specified in the Ninth Schedule. Therefore, in the absence of the amendment being specified in the Ninth Schedule the amendment cannot be protected for infringement of the rights under Part III of the Constitution. See *State of Maharashtra v. Madhavrao Damodar Patil*¹³ (7 Judges). This principle has been reiterated by this Hon'ble Court in *Ramanlal Gulabchand Shah v. State of Gujarat*³⁰ (7 Judges) and in *Sri Ram Ram Narain Medhi v. State of Bombay*³¹ (5 Judges).

37. In connection with the aspect of exclusion of judicial review, the extracts from the judgment of Khanna, J. in *Kesavananda Bharati case*⁴ (SCC para 1533) are very relevant.

- c** 38. The reliance placed by the petitioners in the judgment of this Hon'ble Court in *L. Chandra Kumar v. Union of India*¹⁹ (7 Judges) is misplaced. Though this Hon'ble Court concluded that,

"It appears that this Court has always considered the power of judicial review vested in the High Courts and in this Court, under Article 226 and Article 32 respectively, enabling legislative action to be subjected to the scrutiny of superior courts to be integral to our constitutional scheme;"

- d** the fact remains that under the Constitution itself there are several articles which exclude judicial review. [See for instance, Article 33, Article 74(2), Article 103(1), Article 105(2), Article 122, Article 136(2), Article 163(3), Article 194(2), Article 212, Article 262(2), Article 329(a) and Article 363.]

39. There is a distinction between total exclusion of judicial review and a validation of an Act which has been struck down on the principles applicable to ordinary legislation, namely, violation of Part III of the Constitution or legislative competence.

- e** The fact that Article 31-A and Article 31-C which provide protection to Acts from the challenge under Articles 14 and 19 has been upheld would show that this does not amount to an exclusion of judicial review.

40. This apart, though the judgment in *Indira Gandhi case*⁷ has been extensively quoted in *L. Chandra Kumar*¹⁹ the conclusion drawn therein, namely, that judicial review of election disputes is not a compulsion and this is part of a constitutional scheme, has not been doubted.

- f** *Possibility of abuse is no ground to test the validity of a provision*

41. It is well settled that possibility of abuse cannot be a ground to test the validity of a constitutional provision. Fear of perversion is no test of power. In *Kesavananda Bharati*⁴ a majority of seven Judges held that merely because wide powers were conferred, it would not render a constitutional power unconstitutional.

- g** *What is the test to be applied to Article 31-B?*

42. The controversy with regard to the distinction between ordinary law and constitutional amendments is really irrelevant. The distinction is valid and the decisions from *Indira Gandhi case*⁷ up to *Kuldip Nayar v. Union of India case*³⁴ represents the correct law. It has no application in testing the constitutional amendment placing the Acts in the Ninth Schedule. *There is no manner of doubt that:*

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(A) In *Kesavananda Bharati case*¹ Sikri, C.J. [para 475(h)], Shelat & Grover, JJ. [paras 607, 608(7)], Hegde & Mukherjee, JJ. [paras 742, 744(8)] and Jagannohan Reddy, J. [paras 1211, 1212(4)] all clearly held that the Acts placed in the Ninth Schedule and the provisions thereof have to be subjected to the basic structure test. a

(B) Chaudrachud, C.J. in *Waman Rao case*^{5,6} followed the path laid down by 6 Judges in *Kesavananda Bharati*¹ without quoting from their conclusions and without attempting to reconcile their views with the subsequent development in the law regarding the distinction between ordinary legislations and constitutional amendments. b

43. Therefore, a constitutional amendment which incorporates a legislation in the Ninth Schedule has to be tested on the ground whether such legislation or its provisions violate the basic structure of the Constitution. In the event, the constitutional amendment Act incorporates an Act which violates the basic structure then such an amendment would be ultra vires the powers provided by Article 368 and therefore invalid and the protection provided under Article 31-B would not be available. c

44. It is respectfully submitted that challenge to such a legislation incorporated by a constitutional amendment in the Ninth Schedule on the ground of basic structure is limited to the extent that the fundamental rights which the legislation takes away, damages or destroys the basic structure of the Constitution. It is therefore submitted that the correct approach while testing a legislation incorporated in the Ninth Schedule on the ground of basic structure was formulated by Mathew, J. in *Indira Gandhi Nehru case*⁷ (SCC para 358): d

"358. The utmost that can be said is as I indicated, that even after putting them in the Ninth Schedule their provisions would be open to challenge on the ground that they took away or abrogated all or any of the fundamental rights and therefore damaged or destroyed the basic structure if the fundamental rights or right taken away or abrogated constitutes a basic structure." e

Is Article 31-B a one-time exercise?

45. There is no substance in the argument that Article 31-B is "a one-time exercise". Article 31-B protects Acts and regulations specified in the Ninth Schedule. There is no prohibition that Acts and regulations cannot be included/specified in the Ninth Schedule later. The power to amend the Ninth Schedule flows from the power to amend the Constitution from Article 368. This is the only way in which Article 31-B, the Ninth Schedule and Article 368 can be read together. There are several provisions in the Constitution which contain similar provisions. Under Article 1(2), the States and Territories of India shall be as specified in the First Schedule. Similarly, in Article 1(3)(b), the territory of India shall comprise inter alia of the Union Territories specified in the First Schedule. This does not mean that the First Schedule cannot be changed. Similarly, languages are specified in the Eighth Schedule (see 344 & 351). The Eighth Schedule has been amended from time to time to include several other languages other than those which were there originally. f g

46. This apart, the provisions of Article 367 expressly provides that the General Clauses Act would apply for the purpose of the interpretation of the Constitution as it applies to the interpretation of an Act of the legislature. Therefore, Section 14 of the General Clauses Act would clearly apply. h

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a Constituent power

47. (A) The argument is sought to be made with regard to constitutional amendment and constituent powers and it has been contended that constitutional amendment cannot interfere with the judicial power to enforce fundamental rights. This submission is not correct. In the first place, Article 368 itself provides that the power of amendment is in exercise of constituent power.

b (B) Secondly, Article 368 does not impose any restriction with regard to amendment of Part III of the Constitution. In this connection, it is also important to note that the Twenty-fourth Amendment which inserted clause (4) in Article 13, and clause (3) in Article 368 has been upheld. The distinction between a law made in exercise of legislative power and a law made in exercise of a constituent power has been recognised in *Sasanka Sekhar Maity v. Union of India*²⁵, SCC para 35.

c Conclusion

48. In *Attorney General for India v. Amratlal Prajivandas*³² (9 Judges) Jeevan Reddy, J. for the unanimous Court observed as follows:

d "20. Before entering upon discussion of the issues arising herein, it is necessary to make a few clarificatory observations. Though a challenge to the constitutional validity of 39th, 40th and 42nd Amendments to the Constitution was levelled in the writ petitions on the ground that the said Amendments—effected after the decision in *Kesavananda Bharati v. State of Kerala*¹—infringe the basic structure of the Constitution, no serious attempt was made during the course of arguments to substantiate it. It was generally argued that Article 14 is one of the basic features of the Constitution and hence any constitutional amendment violative of Article 14 is equally violative of the basic structure. This **e** simplistic argument overlooks the *raison d'être* of Article 31-B—at any rate, its continuance and relevance after *Bharati*¹—and of the 39th and 40th Amendments placing the said enactments in the Ninth Schedule. Acceptance of the petitioners' argument would mean that in case of post-Bharati¹ constitutional amendments placing Acts in the Ninth Schedule, the protection of Article 31-B would not be available against Article 14. Indeed, it was suggested **f** that Articles 21 and 19 also represent the basic features of the Constitution. If so, it would mean a further enervation of Article 31-B. Be that as it may, in the absence of any effort to substantiate the said challenge, we do not wish to express any opinion on the constitutional validity of the said Amendments. We take them as they are i.e. we assume them to be good and valid. We must also say that no effort has also been made by the counsel to establish in what manner the said Amendment Acts violate Article 14." (emphasis supplied)

g 49. It is submitted that the abovequoted passage shows that the Bench:

(i) dismissed as simplistic the argument of a violation of Article 14 being equally violative of the basic structure;

(ii) recognised the *raison d'être* of Article 31-B and its continuance and relevance after the judgment of *Kesavananda Bharati case*¹;

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(iii) repudiated the contention that if Articles 21 and 19 also represented the basic features of the Constitution then it would lead to further encroachment of Article 31-B. a

Further Submissions: Validity of Article 31-B

50. In the first two days of opening arguments, the judgment in *Kesavananda Bharati case*¹ was not analysed. In the rejoinder the petitioners have made the following submissions with regard to *Kesavananda Bharati case*¹:

(i) that the validity of Article 31-B was not in question in *Kesavananda Bharati case*¹; b

(ii) that the question of considering the validity of a provision like Article 31-B to validate Acts and the constitutionality thereof, was also not in issue before thirteen Judges in *Kesavananda Bharati case*¹.

51. It was therefore felt necessary to take a search of the papers and proceedings in *Kesavananda Bharati case*¹. It is important to note that an application to urge additional grounds and for amendment of Writ Petition No. 135 of 1972 was made by the petitioners in *Kesavananda Bharati case*¹ on 4-8-1972. This application was allowed by an order dated 10-8-1972. This fact has been noted by Sikri, C.J. in his judgment at paras 6 and 7 and by Chandrachud, J. at para 2021. A certified copy of the application is annexed hereto and marked as Annexure 1. c

52. It is respectfully submitted that the grounds taken in the said application completely belie the submissions made on behalf of the petitioners that the validity of Article 31-B was never raised in *Kesavananda Bharati case*¹. It is submitted that the grounds taken in the aforesaid application with regard to the Twenty-ninth Amendment and the validity of Article 31-B completely negates the aforesaid argument on behalf of the petitioners. The relevant portion of the grounds are extracted hereunder: d

“(xviii) THAT, in any event, the scheme of the Constitution does not confer any power on Parliament to have a permanent validating provision by virtue of Article 31-B and the Ninth Schedule to the Constitution by which from time to time invalid Acts are automatically made valid and screened from judicial scrutiny by its insertion in the Ninth Schedule. e

Such a power is ultra vires the Constitution and, therefore the provisions of Article 31-B and the Ninth Schedule to the Constitution are unconstitutional and void, being beyond the competence of Parliament. f

Furthermore, in any event, Article 31-B was never enacted to be a permanent provision of validating invalid Acts passed by legislatures and was only intended to validate certain Acts and inserted in the Ninth Schedule when Article 31-B was enacted. g

In any event, Parliament had no power to validate statutes by merely inserting them in the Ninth Schedule without amending the main provision of Article 31-B.”

53. The above ground shows that the following was directly in issue:

(i) That the petitioners in *Kesavananda Bharati case*¹ had submitted “that the scheme of the Constitution does not confer any power on Parliament to have a permanent validating provision by virtue of Article 31-B and the Ninth h

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a Schedule of the Constitution by which from time to time invalid Acts are automatically made valid and screened from judicial scrutiny by its insertion in the Ninth Schedule".

(ii) That the petitioners had specifically contended that "such a power is ultra vires the Constitution and therefore the provisions of Article 31-B and the Ninth Schedule of the Constitution are unconstitutional and void, being beyond the competence of Parliament".

b (iii) That the further contention was that "furthermore, in any event, Article 31-B was never enacted to be a permanent provision for validating invalid Acts passed by legislatures and was only intended to validate certain Acts inserted in the Ninth Schedule when Article 31-B was enacted".

c (iv) That the petitioners finally contended that in any event, Parliament had no power to validate statutes by merely inserting them in the Ninth Schedule without amending the main provisions of Article 31-B.

54. The nature of the issues before thirteen Judges can also be seen from the propositions of law submitted by one of the petitioners/intervenor before thirteen Judges. A certified copy of the written submissions is annexed hereto as Annexure 2. In the written submissions dated 28-10-1972 the following submissions were made:

d "Article 31-B does not confer power to add to the Schedule. This Court is invited to hold that Article 31-B was intended to protect only those Acts specified in the Schedule. Article 31-B should have been given a very restricted and narrow interpretation. If such an interpretation is not given to the provisions of the Constitution, the legislatures can make a mockery of the Constitution. Engrafting of exceptions after exceptions to the articles of the Constitution which will eventually result in total emasculation of the Constitution cannot be considered amendments of the Constitution. Abuses of the amending process is a fraud on the Constitution...."

e 55. It is respectfully submitted that all the above issues were the subject-matter before the thirteen Judges in *Kesavananda Bharati case*¹. Only Sikri, C.J. upheld to some extent the above argument and held that the device of Article 31-B was bad insofar as it protects statutes even if they take away fundamental rights.

f 56. In this context, it is important to note that though the ground relating to the validity of Article 31-B had been raised the argument regarding the validity of Article 31-B was not pressed. Hegde and Mukherjea, JJ. and Chandrachud, J. in this regard held as under:

Hegde and Mukherjea, JJ. (para 738)

g "738. The learned counsel for the petitioners did not challenge the validity of Article 31-B. Its validity has been accepted in a number of cases decided by this Court."

Chandrachud, J. (para 2136)

h "2136. The validity of Article 31-B has been accepted in a series of decisions of this Court and I suppose it is too late in the day to reopen that question, nor indeed did the learned counsel for the petitioner challenge the validity of that article."

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57. Counsel for the petitioner did not urge this contention apparently recognising, as observed in para 1.7 hereinabove that "the validity had been accepted in a number of cases" as can be seen from the quotations set out hereinabove. Twelve out of the thirteen Judges proceeded on the basis that it was too late in the day to challenge the validity of Article 31-B having regard to the various decisions of the Supreme Court upholding Article 31-B. a

58. Further, the argument that a permanent validating provision like Article 31-B was invalid was also specifically raised before the thirteen Judges in the amendment. The fact that it was not argued makes no difference. This very same argument is now sought to be raised before your Lordships by saying that this argument was not raised before thirteen Judges—the basis of which is incorrect. A Nine-Judge Bench is, in effect, asked to reconsider an issue which was raised before a Bench of thirteen Judges and which was not pressed into service. b

59. It is submitted that the argument that Article 31-B was never enacted to be a permanent provision for validating invalid Acts passed by legislature and was only intended to validate certain Acts in the Ninth Schedule when Article 31-B was inserted was sought to be urged by the counsel for the petitioner in *Kesavananda Bharati case*⁴ in a slightly extended form by linking Article 31-B with Article 31-A and contending that it was limited to agrarian reform. This argument was expressly rejected. This has already been pointed out in the written submissions which had been submitted on 1-11-2006 in paras III and IV. c

60. It is therefore respectfully submitted that the exercise sought to be undertaken by the petitioners before a Bench of 9 Hon'ble Judges is entirely impermissible as the issue of validity of Article 31-B is no longer *res integra* in view of *Kesavananda Bharati case*⁴. It is, therefore, too late in the day to reopen issues which are expressly concluded. d

61. It is also significant to note that in *Sasanka Sekhar Maity case*²⁵ decided on 9-5-1980 (the same date on which the order in *Waman Rao case*⁵ and in *Minerva Mills case*⁹ was passed) a constitutional Bench of five Judges noted the application to urge additional grounds filed in *Kesavananda Bharati case*⁴. In para 33 of the said judgment, it has been noted that the challenge to the validity of the Constitution (Twenty-ninth Amendment) Act, was allowed to be raised as an additional ground in *Kesavananda Bharati case*⁴. (See *Sasanka Sekhar Maity case*²⁵, SCC at p. 728.) e

*The judgment in Bhim Singhji case*³¹

62. The petitioner's contention that a Constitution Bench of this Hon'ble Court in *Bhim Singhji v. Union of India*³¹ had not applied the test of "basic structure doctrine" while testing the validity of the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 is completely incorrect. In that case, Chandrachud, C.J. (for himself and Bhagwati, J.) upheld the various provisions of the Act except Section 27(1) of the Act. The opinion of Chandrachud, C.J. stated at para 7 that fuller reasons will follow later. Krishna Iyer, J. in his concurring opinion, also upheld the validity of the various provisions of the Act except Section 27(1) of the Act. Subsequently, Chandrachud, C.J. (speaking for himself and Bhagwati, J.) in the same case *Bhim Singhji v. Union of India*³⁵ held that they "fully agreed with the reasons f

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- a given by Krishna Iyer, J. in his judgment". It is therefore submitted that the majority in *Bhim Singhji case*^{31,35} did not strike down Section 21(1) on the basis of violation of a particular fundamental right like Article 14 of the Constitution. On the contrary, Krishna Iyer, J.'s opinion at para 20 clearly indicates that the test which was applied was the basic structure doctrine rather than the violation of a particular fundamental right. *It is therefore submitted that the contention of the petitioner that this Hon'ble Court struck down the provisions of the Act for abridging Article 14 in the aforementioned case is incorrect.*

- b **III. Mr Soli J. Sorabjee, Senior Advocate, on behalf
of the State of Tamil Nadu**

- c 63. The inescapable inference and the legal position which emerges from the overruling of the decision in *Golak Nath case*³ and the ratio laid down by this Hon'ble Court in *Kesavananda case*⁴ is that subject to the retention of the basic structure the plenary power of amendment reaches every part of the Constitution including articles relating to fundamental rights [See *Kesavananda Bharati case*¹, SCC at p. 824 (vii).] In short, fundamental rights are not unamendable and they have been expressly held to be amendable. The theory of implied limitations on the amending power as far as fundamental rights are concerned was expressly negated by the majority of the Judges in *Kesavananda case*¹ and what is more important also by Khanna, J. in *Kesavananda case*¹. [See *Kesavananda Bharati case*¹; Shelat and Grover, JJ., paras 608(2)(a) and (7); Hegde and Mukherjea, JJ., paras 744(2), (4) and (8); Ray, J., paras 866-68, 1064; Jagannathan Reddy, J., paras 1094, 1212; Palekar, J., paras 1279 and 1333(1); Khanna, J. at paras 1421, 1464, 1465 and the conclusion in paras 1537(iii), (vii) and (ix); Mathew, J., paras 1784 and 1786; Beg, J., paras 1851, 1857(1) and (2); Dwivedi, J., para 1884; Chandrachud, J., paras 2075, 2076 and paras 2142(iii) and (iv)].

- e 64. Fundamental rights do occupy an important place in our Constitution. But no fundamental right is expressly made unamendable as was attempted to be done in the Draft Constitution, see SCC para 1092 of *Kesavananda*⁴. In some Constitutions fundamental rights are inalienable, for example Article 1 of the German Constitution, Article 5 of the US Constitution (see Article 11 of the Japanese Constitution). The status and position of fundamental rights in our Constitution can be gauged by reference to Article 33. It is also extremely significant that Part III of the Constitution is not one of the articles amendment to which requires ratification by the legislatures of not less than one-half of the States. In short, fundamental rights under our Constitution are not untouchable and sacrosanct. If fundamental rights were unamendable then it could possibly be argued that Article 31-B is unconstitutional because it permits abrogation of unamendable fundamental rights.

- g 65. It is a fallacy to regard that Article 31-B read with Ninth Schedule excludes judicial review in the matter of violation of fundamental rights. The effect of Article 31-B is to remove a fetter on the power of Parliament to pass a law in violation of fundamental rights. On account of Article 31-B, cause of action for violation of fundamental right is not available because the fetter placed by Part III on legislative power is removed and is non-existent. Non-availability of cause of action based on breach of fundamental right cannot be regarded as exclusion or ouster of judicial review. As a result of the operation of Article 31-B read with the Ninth Schedule, occasion for exercise of judicial review does not arise (see Article 358). But there is

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no question of exclusion or ouster of judicial review. The two concepts are different and have been confused in the submissions of the petitioner. a

66. Retrospective validation of a statute which was void at its inception either because of lack of legislative competence or because of violation of fundamental rights is perfectly permissible. See *M.P.V. Sundararamier*³⁶, SCR at pp. 1438-41, 1467-68, 1476, see also *West Ramnad*³⁷, SCR at pp. 758, 762; *Indira Gandhi*³⁸, SCC at p. 138 as per Ray, C.J. *A fortiori* the same can be effected by a constitutional validating and curative provision like Article 31-B. b

67. Neutralising a judgment or making it ineffective by removing retrospectively the cause or basis which imparted unconstitutionality or invalidity to a statute is neither a trespass into a judicial field nor an usurpation of judicial power. Even in such cases judicial review is available to determine whether (1) the legislature has the requisite legislative competence or (2) whether the validation is effective or it has misfired. It is a fallacy to equate neutralisation of the effect of a judgment by means of a validating mechanism with nullification or defiance of a judgment. It is submitted that when a court declares a statute unconstitutional it does not nullify the will of the people nor does it encroach on Parliament's sovereignty. Likewise when a decision is neutralised by appropriate legislation or constitutional amendment or validation there is no question of defiance or disobedience of the judgment of the court. c

68. Article 31-B is a constitutional curative validating mechanism to remove the basis of the judgment which pronounced the legislation to be unconstitutional by retrospectively deeming that no Article in Part III was ever in existence and retrospectively curing the defect and removing the basis of the judgment, namely, the particular article in Part III. (See *Jagannath*³⁹, SCC at pp. 897-98 and 905; *Padvi*³⁸, SCC at p. 619.) d

69. To elaborate, if the Act was struck down because of infraction of Article 19 but Article 19 was not available because of the deeming fiction and retrospective operation of Article 31-B, the very basis for striking down the legislation has disappeared and the source or the cause which injected the infirmity of unconstitutionality has been fictionally removed by reason of the deeming provision in Article 31-B. Consequently, the legislation is cured of the defect, by the provisions of Article 31-B and the law was never unconstitutional because of the operation of deeming fiction to which full effect must be given without allowing the imagination to boggle (*Araoran Sugars*³⁹, SCC at pp. 336-37, *J.K. Cotton*⁴⁰). Validating and curative exercise by the legislature whereby the effect of the earlier judgment is neutralised or the same is rendered irrelevant and unenforceable cannot be called an impermissible legislative overruling of the judicial decision. (See *Prithvi Cotton Mills*²⁴, SCR at pp. 392-93; *Indira Gandhi*³⁸, SCC at p. 138; *Ujagar Prints*⁴¹, SCC e

36 *M.P.V. Sundararamier & Co. v. State of A.P.*, AIR 1958 SC 468 : 1958 SCR 1422

37 *West Ramnad Electric Distribution Co. Ltd. v. State of Madras*, AIR 1962 SC 1753 : (1963) 2 SCR 747

38 *State of Maharashtra v. M.S. Padvi*, (1978) 1 SCC 615

39 *State of T.N. v. Amaran Sugars Ltd.*, (1997) 1 SCC 326

40 *J.K. Cotton Spg. & Wvg. Mills Ltd. v. Union of India*, 1987 Supp SCC 350 : 1988 SCC (Tax) 26 f

41 *Ujagar Prints v. Union of India*, (1989) 3 SCC 488 : 1989 SCC (Tax) 469 g

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- a at p. 517, para 65; *Arooran Sugars*³⁹, SCC at p. 341; *Bhubaneshwar Singh*⁴², SCC paras 9-12; *Meerut Development*⁴³, SCC at p. 469 and *Virender Singh Hooda*⁴⁴.)

70. Article 31-B has stood the test of time and has successfully weathered constitutional challenges. It is a part of our Constitution and was validly enacted by compliance with the requirements of Article 368. Article 31-B was enacted by the same people who enacted the Constitution and the chapter on fundamental rights after full deliberations. It was not enacted by a motley conglomeration in order to deprive the people of fundamental rights.

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71. One of the reasons for putting an Act in the Ninth Schedule is to remove uncertainties about its validity arising out of forensic challenges, divided judicial pronouncements and to prevent time consuming litigation which would impede the speedy and effective implementation of statute in question. (See Statement of Objects and Reasons, para 18 of *Waman Rao*⁶, SCC at p. 382.) It is incredible but true that despite Article 31(4) which expressly protected zamindari land reform legislation the same was struck down by the Patna High Court in *Kameshwar Singh v. State of Bihar*⁴⁵ on the ground of Article 14. This is an instance of the need to avoid such invalidation of legislation by hyper active judges. The Allahabad and Nagpur High Courts upheld the legislation. (See in this connection observations of Patanjali Sastri, J. extracted in *Waman Rao*⁶, SCC at p. 383 and also paras 22, 23 at pp. 384-86.) There is no warrant to assume that the Acts are put in the Ninth Schedule with the sole purpose of preventing judicial scrutiny. That would be attributing *mala fide* to Parliament which is not permissible. [See also observations of Khanna, J. in *Kesavananda case*⁴, SCC at p. 824, para (vi).] Another basic fallacy in the arguments of the petitioners is that Article 31-B read with the Ninth Schedule totally excludes or ousts judicial scrutiny. This Hon'ble Court has laid down in a number of cases that judicial scrutiny is available with respect to (a) legislative competence of the State or Parliament which has enacted the statute, (b) whether the provisions of Article 368 have been complied with, and (c) whether an amendment has been made to the statute after the insertion of parent statute in which case the amending statute will also have to meet the discipline and requirement of Article 368. Furthermore, judicial scrutiny will also be available whether (a) the statute in question violates Article 286 of the Constitution or (b) is violative of Article 301 of the Constitution. Above all, judicial review and scrutiny is always available in respect of the basic condition which a constitutional amendment has to satisfy, namely, that it does not damage or is violative of the basic structure of the Constitution.

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72. It is inarguable and indeed unstatable that a constitutional provision Article 31-B has become otiose or redundant or it has outlived its utility. In other words that it has become obsolete. The history and operation of Article 31-B clearly militate against its obsolescence or its having fallen into desuetude. There is no warrant in fact or in law for this submission. Occasions may well arise in the future to insert laws in the Ninth Schedule because of their possible challenge in courts, divergent judgments of the courts and the time and resources expended in time-consuming

42 *Bhubaneshwar Singh v. Union of India*, (1994) 6 SCC 77

h 43 *Meerut Development Authority v. Satbir Singh*, (1996) 11 SCC 462

44 *Virender Singh Hooda v. State of Haryana*, (2004) 12 SCC 588 : 2005 SCC (L&S) 1044

45 AIR 1951 Patna 91 (SB)

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litigation. (See *Hindustan Aluminium Corpn.*⁴⁶, SCC at pp. 253-54, paras 65, 66; *Krishan Murgai*⁴⁷, SCC at p. 263, para 51; *Narayan Shamrao Puranik*⁴⁸, SCC at pp. 529, 530; *Bharat Forge*⁴⁹, SCC at p. 445 and *Cantonment Board*⁵⁰, SCC at p. 461, para 16.) a

73. Power under Article 31-B can be exercised from time to time by virtue of Section 14 of the General Clauses Act, 1897 read with Article 367 of the Constitution. (See *Sampat Prakash v. State of J&K*⁵¹, SCR at p. 375; *Pipuru Sudhakar v. Govt. of A.P.*⁵²) b

74. The purpose, scope and effect of Article 31-B

(a) "The object of this article (Article 31-B) is to give blanket protection to the Acts and regulations specified in the Ninth Schedule and the provisions of those Acts and regulations against any challenge to those Acts, regulations or the provisions thereof on the ground that they are inconsistent with or take away or abridge any of the rights conferred by Part III of the Constitution. The result is that howsoever violative of the fundamental rights may be the provisions of an Act or regulation once the Act or regulation is specified in the Ninth Schedule it would not be liable to be struck down on that score. This immunity against the above challenge would be available notwithstanding any judgment, decree or order of any court or tribunal to the contrary." (emphasis supplied) c

*Godavari Sugar Mills v. S.B. Kamble*²³, SCC at p. 706 d

Article 31-B provides a protective umbrella to all Acts of whatever character.

(b) Article 31-B is a constitutional device or mechanism for validating statutes which have been struck down on the ground that they infringe Part III of the Constitution.

*Jeejeebhoy*²⁰, SCR at p. 648; *Indira Gandhi v. Raj Narain*⁷, per Ray C.J.; *Sasanka Sekhar Maity*²⁵, SCC at pp. 728-29 and *Waman Rao*⁶, SCC paras 45-46. e

(c) Article 31-B effects fictional validation by removing or curing the constitutional vice or defect by the express words of the deeming fiction. There is no requirement that before placing the Act in the Ninth Schedule the defect should be cured by a separate validating Act. This argument was expressly rejected in (*Jagannath*¹³, SCC para 23). Article 31-B itself cures the defect which takes "place with retrospective operation from the dates on which the Acts were put on the statute-book". f

Article 31-B in substance and effect is a curative provision and by the very terms of Article 31-B and the Ninth Schedule it cures the defect, if any, in the various Acts mentioned in the said Schedule as regards any unconstitutionality alleged on the ground of infringement of fundamental rights. Moreover by the g

⁴⁶ *State of U.P. v. Hindustan Aluminium Corpn.*, (1979) 3 SCC 229

⁴⁷ *Superintendence Co. of India v. Krishan Murgai*, (1981) 2 SCC 246

⁴⁸ *State of Maharashtra v. Narayan Shamrao Puranik*, (1982) 3 SCC 519

⁴⁹ *Municipal Corpn. for City of Pune v. Bharat Forge Co. Ltd.*, (1995) 3 SCC 434

⁵⁰ *Cantonment Board v. M.P. SRTC*, (1997) 9 SCC 450

⁵¹ *Sampat Prakash v. State of J&K*, AIR 1970 SC 1118 : (1969) 2 SCR 365 h

⁵² WPs (CrI) Nos. 284-85 of 2005

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- a express words of Article 31-B such curing of the defect takes "place with retrospective operation from the dates on which the Acts were put on the statute-book". (emphasis supplied) (See *Jagannath*¹³, SCC para 23.)
- (d) In *State of Maharashtra v. M.S. Padvi*³⁸ decided on 14-2-1978 i.e. after the decision in *Kesavananda Bharati case*⁴, legislation which was struck down by the Bombay High Court as unconstitutional, while the appeal against the judgment was pending in the Supreme Court, was placed in the Ninth Schedule. A Bench of seven Judges by a unanimous judgment held as follows:
- b "The effect of the inclusion was that the West Khandesh Melwassi Estate (Proprietary Rights Abolition, etc.) Regulation, 1961 was immunised from challenge on the ground that it was inconsistent with or took away or abridged any of the rights conferred by Part III of the Constitution and hence its constitutional validity could no longer be assailed on the ground that it violated Article 19(1)(f). Article 31-B and the Ninth Schedule cured the defect, if any, in the West Khandesh Melwassi Estate (Proprietary Rights Abolition, etc.) Regulation, 1961 as regards any unconstitutionality alleged on the ground of infringement of fundamental rights and by the express words of Article 31-B, such curing of the defect took place with retrospective operation from the date on which this Regulation was enacted by the Governor. This Regulation, even if inoperative or void at the time when it was issued by the Governor on account of infringement of Article 19(1)(f) of the Constitution, assumed full force and vigour from the date of its enactment by reason of its inclusion in the Ninth Schedule." (para 4) (emphasis supplied)
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- (e) The issue about the curative consequences resulting from the insertion of an Act which has been struck down as unconstitutional in the Ninth Schedule has been authoritatively and categorically answered by two decisions of this Hon'ble Court viz. *Jagannath*¹³ and *Padvi*³⁸, both of which are unanimous judgments of seven Judges. The law laid down in these two decisions is that the mere insertion of the legislation in the Ninth Schedule has the effect of curing the infirmity or defect because the basis of the judgment, namely, Article 14 or 19 or 31, as the case may be, on the basis of which legislation was declared unconstitutional, is removed retrospectively by the deeming clause in Article 31-B and the non-obstante clause.
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- f
- The binding nature of the law so declared about the scope and effect of Article 31-B is not in any manner affected save and except that the curative consequence of Article 31-B will not extend to nor will it protect any legislation which damages the basic structure of the Constitution.
- The Seven-Judge Bench decision in *Padvi*³⁸ which is after *Kesavananda Bharati*⁴, is binding and its ratio is not in any manner affected by the decision in *Waman Rao*^{5,6}. *Waman Rao*^{5,6} is a Five-Judge Bench decision. It has not noticed *Padvi*³⁸ a Seven-Judge Bench decision, and to that extent it is per incuriam. In any event *Waman Rao*^{5,6} cannot even remotely be said to have impliedly overruled *Padvi*³⁸.
- g
75. It is submitted that once an Act has been inserted in the Ninth Schedule the effect of Article 31-B is that the basis or the ground of invalidation, namely, violation of a fundamental right no longer exists and thus the basis of the judgment is removed or fundamentally altered.
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It is submitted that Article 31-B itself operates as a deeming validating provision. It is submitted that there is no necessity of a separate validating Act taking away the basis of the judgment before the Act is put in the Ninth Schedule. The very factum of inclusion in the Ninth Schedule of the Act cures the Act of the defect by removing the basis which is pointed out in the judgment holding the legislation to be unconstitutional. In this context, the words "shall be deemed to be void or ever to have become void" are significant and should be given full effect. a

76. The rationale of validating provisions in the wake of court judgments has been enunciated in the classic judgment of this Hon'ble Court in *Prithvi Mills v. Branch Municipality*²⁴ (SCC para 4). b

77. The same principle was reiterated by another Constitution Bench decision in *Ujagar Prints v. Union of India*⁴¹ (SCC at p. 517). These principles have been reiterated and the scope of deeming fiction has been explained by a recent Constitution Bench decision in *State of T.N. v. Arooran Sugars Ltd.*³⁹ (SCC at pp. 336-37; 340-41, para 16). c

78. In the leading judgment of this Hon'ble Court in *West Ramnad Electric Distribution Co. Ltd. v. State of Madras*³⁷, the specific contention was that "the earlier Act of 1949 being dead and non-existent, the impugned notification contravened Article 31(1) and this contravention of a fundamental right cannot be cured by the legislature by passing a subsequent law and making it retrospective" (see SCR at p. 762). The said contention was expressly rejected in these words: "... if the legislature can validate actions taken under one class of void legislation, there is no reason why it cannot exercise its legislative power to validate actions taken under the other class of void legislation. We are, therefore, not prepared to accept Mr Nambiar's contention that where the contravention of fundamental rights is concerned, the legislature cannot pass a law retrospectively validating actions taken under a law which was void because it contravened fundamental rights" (see SCR at p. 764). d

Thus it is settled law that validating legislation can be passed prospectively, or retrospectively to remove the basis of the judgment. e

79. It is a misconception to consider such legislative exercises as a trespass or an encroachment on judicial powers. The aforesaid principles relating to validation of ordinary legislation apply a fortiori to Article 31-B which is a constitutional mechanism to remove the basis of the judgment which pronounced the legislation to be unconstitutional by retrospectively deeming that no article in Part III was ever in existence and therefore the basis of the judgment, say violation of a particular article in Part III, is displaced. To elaborate, if the Act was struck down because of infraction of Article 19 and Article 19 is no longer available because of retrospective operation of Article 31-B, the very basis for striking down the legislation has disappeared, the source or the cause which injected the infirmity of unconstitutionality has been fictionally removed by reason of the deeming provision in Article 31-B. Consequently, the legislation is cured of the defect by the provisions of Article 31-B and is no longer nor ever was unconstitutional. That is the result of the deeming fiction and full effect must be given to it without allowing the imagination to boggle. Validating and curative exercise by the legislature whereby the effect of the earlier judgment is neutralised or the same is rendered irrelevant and unenforceable cannot be called an impermissible legislative overruling of the judicial decision. f
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- a "In its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made."

[See *Meerut Development Authority v. Satbir Singh*⁵³, SCC at p. 469 (c-d).]

80. Attention is also invited to the observations of this Hon'ble Court in *Raghunathrao Ganpatrao v. Union of India*⁵³: (SCC at p. 218, para 91)

- b "The Twenty-sixth Amendment itself was passed by Parliament to overcome the effect of this judgment."

81. It is a fallacy to equate neutralisation of the effect of a judgment by means of a validating mechanism with nullification or defiance of a judgment. It is submitted that when a court declares a statute unconstitutional it does not nullify the will of the people nor does it encroach on Parliament's sovereignty. Likewise when a decision is neutralised by appropriate legislation or constitutional amendment or validation there is no question of defiance or disobedience of the judgment of the court.

- c 82. Constitutional amendments have been made in other jurisdictions which have a Bill of Rights and the rule of law is respected to neutralise the effect of the judgment of the highest court of the land. The rationale is that the most straightforward way to respond to a Supreme Court decision with which there is disagreement, is to amend the Constitution. Indeed that is an effective answer to critics who regard judicial review as undemocratic. (See *Stone Seidman's Constitutional Law*, 2nd Edn., p. 72.)

83. For example, in the United States there have been four or perhaps five occasions to override Supreme Court's decisions. (See *Tribe's American Constitutional Law*, 2nd Edn., pp. 64-65, and in particular fn 10.)

- e 84. In England, Parliament has exercised the power to legalise past illegalities and to alter the law retrospectively. This power has been used by an executive with a secure majority in Parliament to reverse inconvenient decisions of an impartial judiciary. (emphasis added) (See *Bradley's Constitutional and Administrative Law*, 12th Edn., p. 61.)

- f 85. In Australia, when a judgment of the Full Court of the Supreme Court of Queensland was pending in appeal in the High Court of Australia the validating legislation with a deeming provision was passed. In view of the amending and validating Act the High Court of Australia rescinded the special leave granted by it. The Privy Council upheld the judgment of the High Court of Australia. (See *Western Transport v. Kropp*⁵³.)

- g 86. In Malaysia, a provision of the Federal Constitution was amended by adding a proviso, which was deemed to have retrospective effect from 27-8-1957. The amendment was effected on 27-8-1976 after the High Court held in favour of the appellant on 21-3-1976. The Federal Court of Malaysia, in allowing the government's appeal, held that this proviso operated to validate the appellant's dismissal.

87. The Privy Council upheld the judgment of the Malaysian Federal Court in *Zainal v. Malaysian Govt. Viscount Dilhorne*⁵⁴. Reference is invited to the observations of the Privy Council at p. 245 between (f) & (h).

- h 53 1965 AC 914 : (1964) 3 WLR 1082 : (1964) 3 All ER 722 (PC)
54 1980 AC 734 : (1980) 2 WLR 136 : (1979) 3 All ER 241 (PC)

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88. According to the majority decision in *Kesavananda Bharati*⁴ a constitutional amendment can be challenged on the ground that it damages the basic structure of the Constitution and abrogates its essential features. However, in this connection it is submitted that each and every fundamental right is not an essential feature of the Constitution and the same can be amended. a

89. It is submitted that the inevitable and inescapable consequence of overruling *Golak Nath*³ in *Kesavananda Bharati* case⁴ is that fundamental rights can be amended. If fundamental rights can be amended fundamental rights cannot be said to be part of the basic structure. b

90. According to the majority judgment in *Kesavananda Bharati*⁴ fundamental rights are amendable and not unamendable. The correct legal position has been set out in Justice Khanna's judgment in *Kesavananda Bharati*⁴, SCC para 1537(vii).

The position is further clarified in *Indira Gandhi v. Raj Narain*⁷, SCC at p. 114, para 251 and SCC at p. 116. c

91. In any event it is submitted that right to property has been held not to be a part of the basic structure. See *Kesavananda Bharati*⁴, SCC para 1537(viii); *Indira Nehru Gandhi*⁷, SCC at p. 116. See also *Raghunathrao Ganpatrao v. Union of India*³³ (SCC at p. 231, para 157):

"The right to property even as a fundamental right was not a part of the basic structure." d

92. Equality by itself is not part of the basic structure. See *Indira Nehru Gandhi*⁷, SCC at p. 135.

Outright negation of equality by placing a particular individual above the law and which also destroyed the basis of the rule of law was regarded as an essential feature of the Constitution by Chandrachud, J. in *Indira Nehru Gandhi* case⁷ (SCC at pp. 257-58). (emphasis added) e

93. There is a vital distinction between the invalidation of legislation because of infringement of Article 14 and invalidation of a constitutional amendment on account of violation of the essential feature of equality.

For example, (a) legislation struck down because of unfettered discretion to licensing authorities; (b) different procedures for acquisition; (c) excise exemption granted to certain manufacturing industries and not to others; and (d) cases of underinclusion or overinclusion. In the above illustrative cases, it is submitted that even though Article 14 may be infringed there is no violation of the basic structure. f

94. It is submitted that any and every infraction of Article 14 simpliciter irrespective of its repercussions on other articles of Constitution cannot tantamount to the violation of the basic structure.

For example, legislation which strikes at the root of the equality principle, which violates the essence of equality and which has its repercussions on other essential features of the Constitution may not be protected by Article 31-B and the Ninth Schedule because such legislation can be regarded as damaging the basic structure of the Constitution. For example, (a) legislation that persons belonging to a particular community alone can occupy certain high offices. Such legislation strikes at the essence of the equality which underlies the essential feature of the secularism; (b) bar of any civil or criminal proceedings against a particular individual or a class of persons in respect of malfeasance or criminal misconduct—in such a case the essential feature of rule of law is also damaged; and (c) trial of criminal offences in g
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- a respect of some individuals alone by military tribunals in camera, this would be violative of Article 14 read with Article 21, and damage the basic structure.

- b 95. The decision in *Bhim Singhji*³⁵ was reached after examining the provisions of the Act and reaching the conclusion that Section 27(1) of the Urban Land Ceiling Act was violative of the basic structure inter alia because it ran counter to the directive principles. See pp. 899 and 932-33 and hence was not protected by Article 31-B. There was no occasion to consider *Jagannath*¹³ nor *Padvi*³⁸ and the said decisions have not been noticed. *Bhim Singhji*^{28,35} is not an authority for the proposition that mere insertion of an Act which has been declared unconstitutional in the Ninth Schedule is itself unconstitutional. *Bhim Singhji case*²⁸ recognises that there are shades and degrees of inequalities and is a complete answer to the petitioner's contention to the contrary. (See SCC para 20.)

- c 96. The observations in *Bhim Singhji*²⁸ relevant for the present case are at SCC pp. 889-90.

- d 97. There is no total exclusion or complete ouster of judicial review on account of the insertion of an Act in the Ninth Schedule. Judicial review is available with regard to (a) compliance with the form and procedure and requirements prescribed by Article 368; (b) the question of legislative competence of the Union or the State which passed the Act, as the case may be; (c) whether the Act inserted in the Ninth Schedule violates the basic structure of the Constitution; and (d) if the legislature amends any of the provisions contained in the said Acts, the amended provisions would not receive the protection of Article 31-B and its validity may be liable to be examined on merits. (See *State of Bihar v. Kameshwar Singh*²².)

- e 98. The effect of insertion of a piece of legislation in the Ninth Schedule is that "only a certain class of cases has been excluded from the purview of Part III and the courts could no longer interfere, not because their powers were curtailed in any manner or to any extent, but because there would be no occasion hereafter for the exercise of their power in such cases". (See *Sankari Prasad v. Union of India*¹, SCR at p. 108.)

- f 99. In *Sajjan Singh case*² the specific contention was that the insertion of the Act in the Ninth Schedule "purports in substance to set aside decisions of courts of competent jurisdiction and therefore the same was unconstitutional". That contention was negatived (see SCR at p. 945). The effect of Article 31-B read with Ninth Schedule is that "certain area of cases in which the said powers could have been exercised had been withdrawn" [see SCR at p. 947(F)].

- g 100. The impugned Act which is inserted in the Ninth Schedule as Item 80 was struck down on the ground that it did not have protection of Article 31-A. Consequently, the Act was in violation of the fundamental right of property under Article 19(1)(f) and Article 31(2). The Act was not struck down on the ground of Article 14.

- h 101. It is submitted that the constitutionality of the very Thirty-fourth Amendment by which the State Act in question was inserted in the Ninth Schedule has been upheld by the Constitution Bench of this Hon'ble Court in its decision in *Sasanka Sekhar Maity*²⁵ (SCC at pp. 721, 728, paras 7 and 34).

- It is significant that the judgment in *Maity case*²⁵ was pronounced on the same date as the judgment in *Waman Rao case*⁵ (i.e. on 9-5-1980).

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It is submitted that the constitutionality of the insertion of the Thirty-fourth Amendment Act in the Ninth Schedule is no longer *res integra* and is concluded by the decision in *Maity case*⁵⁵. a

102. It is further submitted that the impugned legislation dealt with property rights. It was struck down on the ground that the acquisition of the forests on the pannan land was not protected by Article 31-A. Consequently, Article 31(2) was violated.

103. After the judgment, the Constitution (Twenty-fifth Amendment) Act amended Article 31(2). The expression "amount" was substituted for the expression "compensation". Thus the defect, if any, was cured. b

104. In any event impugned legislation can be sustained under Article 31-C as it is covered by Articles 39(b) and (c) of the Constitution. In that event the question of considering the scope and effect of Article 31-B does not arise.

105. It is respectfully submitted that the decisions of the Hon'ble Court which have held the field and stood test of time should not be overruled unless compelling public interest is cogently established. See *Ambika Prasad Mishra v. State of U.P.*⁵⁵, SCC para 5, wherein the Hon'ble Court observed that c

"it is fundamental that the nation's Constitution is not kept in constant uncertainty by judicial review every season because it paralyses, by perennial suspense, all legislative and administrative action on vital issues deterred by the brooding threat of forensic blow up". d

106. This judicial approach and thinking are also reflected by Bhagwati, J. in *Minerva Mills Ltd. v. Union of India*⁹ (SCC para 90).

107. In this connection attention is also invited to the observations in the judgment of this Hon'ble Court in *Rupa Ashok Hurra v. Ashok Hurra*⁵⁶ (SCC at pp. 408-410, paras 29-33).

108. The petitioner's submission regarding "total exclusion" of judicial review proceeds on a misconception that there is complete ouster of judicial review of an Act even on the touchstone of Part III. On the contrary, judicial review is available even on the ground that the Act takes away fundamental rights guaranteed in Part III, provided that the extent and nature of abrogation of the fundamental rights in question damages the basic structure of the Constitution. Any and every abrogation of a fundamental right is not immunised. It depends on the nature of the right, its place in the constitutional scheme and the impact of the abrogation or violation of the fundamental right on other fundamental rights and the essential features of the Constitution. In a given case abrogation of a fundamental right by a statute placed in the Ninth Schedule may amount to damage or impairment of the basic structure and struck down as unconstitutional. In other words, judicial review is available even on the touchstone of rights mentioned in Part III, by application of the basic structure test. Further, it would only be the courts, in exercise of powers under Articles 226 and 32 which would be competent to determine whether the impugned abrogation of fundamental rights is destructive of the basic structure of the Constitution. Hence there is no question of total ouster of judicial review. e

109. For example, a law nationalising all newspapers can be successfully challenged on the ground of violation of the basic structure because free press is an f

55 (1980) 3 SCC 719

56 (2002) 4 SCC 388

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- a instrument of democratic control and accountability and is necessary for the functioning of democracy and by the abrogation of this right a basic feature of the Constitution, namely, democracy is impaired. Again, suppose a law is passed prohibiting profession and propagation of religion. Violation of Article 25 in this case would also tantamount to a violation of basic feature of the Constitution because religious freedom is an essential feature of the Constitution. A law which provides for trial of criminal offences by military or non-judicial personnel and denies legal assistance to the accused and the trial is held in camera, could be challenged on the ground that it damages the basic structure because it violates the essence of Article 21 which is a basic feature of the Constitution. Suppose a law is passed which reserves the offices of the President, Vice-President and the Prime Minister to be occupied by persons belonging only to a particular community or it debars persons belonging to certain communities and religion from occupying these offices. Even if such a law is inserted in the Ninth Schedule it is liable to be struck down because it affects the quintessence of equality and also impacts on the essential feature of secularism.

- b 110. On the other hand, suppose a law which prohibits chit funds and lotteries and make them unlawful and that law is put in the Ninth Schedule to forestall and avoid forensic challenges, uncertainties of litigation and divergent judicial decisions. Such a law would not damage the basic structure of the Constitution having regard to the fundamental rights involved. It may be mentioned that lottery and gambling have been held by this Hon'ble Court to be *res extra commercium* and not entitled to the benefit of Article 19. A law which bans the production and sale of liquor and is put in the Ninth Schedule cannot be said to damage the basic structure of the Constitution in view of the nature of the activity which this Court in *Har Shankar case*⁵⁷ held not to enjoy the status of fundamental rights. On the other hand, in view of the espionage activities and leakage of secret vital information by armed forces, suppose a law is passed which permits surveillance and interception of communication in military establishment to combat espionage activities cannot be said to damage the basic structure of the Constitution even if some of its provisions do not provide for a full hearing or for cross-examination. What is sought to be emphasised is that in every case judicial review with regard to damage to the basic structure or otherwise is available depending on the nature of the fundamental rights and to the extent of its abridgement and its impact on the essential features of the Constitution.

- c 111. It needs to be emphasised that this Court has effectively exercised its power of judicial review and held constitutional amendments to be unconstitutional. For example, see *Indira Gandhi case*⁷, *Minerva Mills*⁹, *L. Chandra Kumar*¹⁹ and *Bhim Singhji*^{28,35}. The Bombay High Court has also ruled that MRTP Act in its application to the press is unconstitutional. On the other hand, Twenty-sixth Amendment relating to abolition of privy purse and insertion of SAHEMA in the Ninth Schedule has been held to be constitutional.

- d 112. Attention is invited to the observations of Chandrachud, J. in *Indira Gandhi case*⁷ (SCC at para 666) where the learned judge has observed as follows:

- e "... the Constitution, as originally enacted, expressly excluded judicial review in a large variety of important matters. Articles 31(4), 31(6), 136(2), 227(4), 262(2) and 329(1) are some of the instances in point. True, that each of these provisions has a purpose behind it but these provisions show that the

57 *Har Shankar v. Dy. Excise & Taxation Commr.*, (1975) 1 SCC 737

56 SUPREME COURT CASES (2007) 2 SCC

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Constitution did not regard judicial review as an indispensable measure of the legality or propriety of every determination. Article 136(2) expressly took away the power of the Supreme Court to grant special leave to appeal from the decisions of any court or tribunal constituted by a law relating to the armed forces. Article 262(2) authorised Parliament to make a law providing that the Supreme Court or any other court shall have no jurisdiction over certain river disputes. ...” (See SCC p. 253.) a

113. Alternatively, it is submitted that a citizen whose fundamental rights are violated is not without a remedy. In the first place, if the violation is of a nature which damages the basic structure he can approach the High Courts under Article 226 or the Supreme Court under Article 32. If the Court accepts the petitioner’s contention then the legislation in question enjoys no immunity from Part III of the Constitution the petitioner can have such a law struck down under Article 13. b

114. It needs to be emphasised that this Hon’ble Court did not hold that the constitutional device of retrospectively validating laws which were found to be in breach of fundamental rights was invalid or unconstitutional. It is only Sikri, J. who held that the device of Article 31-B and the Ninth Schedule is bad insofar as it protects a statute even though it takes away fundamental rights. (See *Kesavananda Bharati*⁴, SCC at p. 404, para 469.) c

115. There is a fundamental and qualitative distinction between Article 31-A and Article 31-B. In the first place, it should be noted that the Acts are not inserted in the Ninth Schedule upon any executive determination or decision. Secondly, Article 31-A excludes fundamental rights mentioned therein on the basis of an ordinary law passed by Parliament or by a State Legislature. The same is the position with regard to Article 31-C. d

116. On the other hand, a constitutional amendment inserting Acts in the Ninth Schedule can be brought only by exercise of constituent power by Parliament when the Bill is passed in each house by a majority of the total membership of the House and by a majority of not less than two-third members of the House present and voting. Furthermore, certain articles as mentioned therein by the proviso if they are sought to be amended the amendment shall required to be ratified by the legislatures of not less than one-half of the States. e

117. It is settled that possibility of abuse of power is not a ground for denying existence and exercise of power in *Matajog Dobey*⁵⁸. Constitutional provisions should not be interpreted on apprehensions of their possible abuse. (See *Kesavananda Bharati*⁴, SCC at pp. 762-63, paras 1417-18.) f

118. The doctrine of consequences has no application in construing grant of power conferred by a Constitution. In considering grant of power the largest meaning should be given to the words of the power in order to effectuate it fully. [See *Kesavananda Bharati*⁴, SCC at p. 565, para 849. See also *Ajay Pradhan (Dr.)*⁵⁹, SCC at pp. 518-19, para 7.] g

119. The level and intensity of judicial scrutiny has to be the same in respect of the Acts placed in the Ninth Schedule irrespective of their character. Different levels of judicial scrutiny are unwarranted. In America, strict scrutiny is applied in cases of legislation based on suspect classification, namely, those based on gender or race. h

58 *Matajog Dobey v. H.C. Bhari*, AIR 1956 SC 44 : (1955) 2 SCR 925 : 1956 Cri LJ 140

59 *Ajay Pradhan (Dr.) v. State of M.P.*, (1988) 4 SCC 514

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a 120. It is submitted that there is no scope for applying this principle to a constitutional provision like Article 31-B in which there is no inbuilt inhibition about the nature or character of laws that may be included in the Ninth Schedule.

121. The so-called laundry bag of the Ninth Schedule is not overflowing as was sought to be projected. Several Acts are Acts effecting amendments to the parent Act already inserted in the Ninth Schedule.

b 122. It is open to the Court in determining whether a statute violates the basic structure to consider not, namely, the terms of the statute but also the direct effect of its operation.

123. The Statement of Objects and Reasons can be looked at to ascertain why the statute was put in the Ninth Schedule.

Further Submissions:

c 124. In the rejoinder it was submitted by Senior Counsel F.S. Nariman that this Hon'ble Court in *Bhim Singhji case*²⁸ struck down the law on the ground of violation of Article 14. This is demonstrably incorrect. It needs to be noticed that Tulzapurkar, J. alone struck down the entire Act on the ground that its provisions "flagrantly violate those aspects of fundamental rights that constitute basic structure" (see SCC pp. 189-90). In other words, on the ground that the Act violated the basic structure and not on the ground of violation of Article 14. Tulzapurkar, J. was clearly in the minority about the striking down of the entire Act. The majority consisting of Chandrachud, C.J., Bhagwati, J., and Krishna Iyer, J., who have emphatically disagreed with Tulzapurkar, J. partially struck down Section 27(1) of the Act. There is not a word or a statement that Section 27(1) was partially struck down on account of violation of Article 14. A.P. Sen, J. struck down some other provisions of the said Act in addition to partial striking down of Article 27(1) but that was not on the ground of violation of Article 14 *per se*. Sen, J. also disagreed about the striking down of the Act in its entirety. Thus the submission that in *Bhim Singhji*²⁸ the Act was not struck down on the violation of Article 14 simpliciter is incorrect.

e 125. Furthermore, the petitioner's reading of the judgment in *Waman Rao case*⁶ is flawed. It is erroneous to read a judgment by picking out one sentence and trying to read it in isolation or *dehors* the context. Senior Counsel F.S. Nariman for the petitioner has placed heavy reliance on one sentence by Chandrachud, C.J. in para 51, namely, that "Acts and regulations, which are or will be included in the Ninth Schedule on or after 24-4-1973 will not receive the protection of Article 31-B...." On the basis of this sentence torn out of context it is submitted that no constitutional amendment after 24-4-1973 will receive the protection of Article 31-B. The subsequent paragraphs would clearly establish that this reading is not correct because what the learned Chief Justice obviously meant was that the laws included in the Ninth Schedule post-1973, will not receive the "full protection" or the "blanket protection" of Article 31-B but that these laws "... will be valid only if they do not damage or destroy the basic structure of the Constitution". This is evident from the very next sentence. This is also obvious from the statement of the learned Chief Justice in para 55. This is also plain from the statement in the operative part of the order of the Court passed on 9-5-1980 and set out in SCC para 63 at p. 403.

g 126. Senior Counsel for the petitioner has, in rejoinder, strongly for the first time relied upon the judgment of a Constitution Bench in *Minerva Mills case*⁹ in particular SCC paras 56-61. By drawing an analogy it was sought to be contended that a mechanism like Article 31-B virtually tears away the basic fundamental freedoms and gives primacy to all laws in the Ninth Schedule over Part III, and

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thereby, ipso facto, destroys the basic structure of the Constitution. It is submitted that since this judgment was read for the first time in rejoinder, and for lack of time the respondents could not point out that this judgment has been strongly criticised by a Constitution Bench of this Hon'ble Court in *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.*⁶⁰, SCC paras 9-16 at p. 159. a

127. The submission of the petitioners that Article 31-B provides no standard and therefore, considering the width of the power, the provision itself is invalid proceeds on a conceptual misconception. It is submitted that though Article 31-B provides constitutional immunity to laws mentioned in the Ninth Schedule, the source of the power to add to the said Schedule lies in Article 368 itself. In other words, once a law is put in the Ninth Schedule in exercise of constituent power, the "standard" for review of such inclusion will necessarily be the basic structure test, which is a matter of objective determination by the Court. The emphatic conclusion in *Kesavananda case*¹ is that there can be no limitation on the exercise of constituent power except the test of basic structure. In other words, the necessary consequence of *Kesavananda case*¹ is that the only standard available for judging the validity of a constitutional amendment is the basic structure test and no other. Reading in any other additional limitation on the exercise of constituent power would run counter to the authoritative ruling of *Kesavananda case*¹. b

128. If Parliament can, in the exercise of its constituent power, amend each and every provision of Part III, the legal sequitur is that Parliament can also in the exercise of the same constituent power, grant immunity to certain laws that may be inconsistent with or abridge the provisions of Part III—subject of course to the limitation that the grant of immunity under Article 31-B to any particular law does not destroy or damage the basic structure of the Constitution. c

129. Further, the Court in *Kesavananda case*¹ not only held that Article 31-B is not controlled by Article 31-A but also specifically upheld the Twenty-ninth Constitution Amendment whereby certain Kerala Land Reform Acts were included in the Ninth Schedule, after those Acts had been struck down by the Supreme Court in *Kunjuikutty case*⁶¹. The only logical basis for upholding the Twenty-ninth Amendment is that the Court was of the opinion that the mechanism of Article 31-B, by itself, is valid, though each time Parliament in exercise of its constituent power added a law in the Ninth Schedule, such exercise would have to be tested on the touchstone of the basic structure test. [See *Shelat & Grover, JJ.*, paras 607 & 608(7); *Hegde & Mukherjee, JJ.*, paras 738-43, 744(8); *Ray, J.*, paras 1055-60, 1064; *Jaganmohan Reddy, J.*, para 1212(4); *Palekar, J.*, para 1333(3); *Khanna, J.*, paras 1522, 1536, 1537(xv); *Mathew, J.*, para 1782; *Beg, J.*, paras 1857(6); *Dwivedi, J.*, para 1994, 1995(4) and *Chandrachud, J.*, paras 2136-41 and 2142(10).] d

130. As pointed out it is a fallacy to regard that Article 31-B read with the Ninth Schedule excludes judicial review in the matter of violation of fundamental rights. The effect of Article 31-B is to remove a fetter on the power of Parliament to pass a law in violation of fundamental rights. On account of Article 31-B, cause of action for violation of fundamental right is not available because the fetter placed by Part III on legislative power is removed and is non-existent. Non-availability of cause of action based on breach of fundamental right cannot be regarded as exclusion or ouster of judicial review. As a result of the operation of Article 31-B read with the e

60 (1983) 1 SCC 147

61 *Kunjuikutty Sahib v. State of Kerala*, (1972) 2 SCC 361 f

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- a Ninth Schedule, occasion for exercise of judicial review does not arise. But there is no question of exclusion or ouster of judicial review. The two concepts are different.

131. A Constitution Bench of this Hon'ble Court in *West Ramnad Electric Distribution Co. Ltd. v. State of Madras*³⁷ held that retrospective validation of a statute which was *ab initio* void at its inception either because of lack of legislative competence or because of violation of fundamental rights is perfectly permissible. The decision in *West Ramnad*³⁷ was not questioned in rejoinder. A *fortiori*

- b retrospective validation can be effected by a constitutional validating and curative provision specifically enacted for that purpose like Article 31-B which has been upheld by this Hon'ble Court.

132. Submission of one of the counsel for petitioners was that the principle that legal fiction created in Article 31-B should be given full effect to without allowing the imagination to be boggled, is applicable only in case of statute and not in the cases of constitutional provision like Article 31-B. This submission is bereft of any logic, principle or authority.

- c 133. It is a well-settled legal position that Article 31-B is not controlled by Article 31-A. Accordingly, the laws which can be inserted in the Ninth Schedule do not have to be of the character or nature of laws specified in Article 31-A. The first 13 Acts inserted by the Constitution First Amendment Acts related to agrarian reforms. As Article 31-B is not so controlled, laws other than Article 31-A laws can be inserted. Therefore, to say that Article 31-B has spent itself upon the inclusion of 13 Acts in the Ninth Schedule is totally unwarranted. It needs to be emphasised that grave situations may arise which may necessitate the inclusion of laws in the Ninth Schedule because of the urgency of the matter and the need for speedy implementation unhindered by tardy litigation and divided judicial verdicts. The submission of one of the counsel of petitioners was that in such an eventuality a separate article was necessary in the Constitution like Article 31-D but the Ninth Schedule cannot be amended by inserting in it such a law. The said submission is not based on any principle or logic. The additional Article 31-D *et seq* would require a constitutional amendment and would have to undergo the same procedure under Article 368 for an insertion of an Act in the Ninth Schedule. Furthermore, it needs to be noticed that amendments to the parent Acts already inserted in the Ninth Schedule would become necessary. As pointed out in the submissions of Senior Counsel T.R. Andhyarajina there are 142 Amendment Acts in the Ninth Schedule (see Annexure I to the submissions of T.R. Andhyarajina). If the contention of the petitioner's counsel is correct and accepted, the Constitution would be cluttered by Articles like 31-D going up to Article 31-ZZ which would bring down the level and status of the paramount law of the land to the status of the Income Tax Act. If once it is accepted that such a power is necessary and there can be proper occasion for the exercise of that power, the suggested methodology of non-amendment of the Ninth Schedule but enactment of separate constitutional provisions makes no sense.

- g 134. Senior Counsel F.S. Nariman submitted that Article 31-B has spent itself. The submission is not supported by any material or authority but is a mere *ipse dixit*. In fact the history and operation of Article 31-B clearly negative that this constitutional provision has spent itself or has become obsolete. Only one sentence from the judgment of this Court in *State of U.P. v. Hindustan Aluminium Corpn.*⁴⁶
- h was read out in which it is mentioned that a statute can become obsolete if it has spent itself. The significant passages in the judgment are omitted, namely:

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"It has to be appreciated that the power to legislate is both positive in the sense of making a law, and negative in the sense of repealing a law or making it inoperative. In either case, it is a power of the legislature and should like where it belongs. Any other view will be hazardous and may well be said to be an encroachment on the legislative field. In an extreme and a clear case, no doubt, an antiquated law may be said to have become obsolete—the more so if it is a penal law and has become incapable of use by a drastic change in the circumstances. But the judge of the change should be the legislature, and courts are not expected to undertake that duty unless that becomes unavoidable and the circumstances are so apparent as to lead to one and only one conclusion. This is equally so in regard to the delegated or subordinate legislation." (SCC para 66 at p. 254) (emphasis added)

The same view has been taken by the Court in other cases mentioned in para 11, above.

135. Validating legislation after it has been pronounced unconstitutional is a method employed by democratic countries. There is nothing inherently outrageous about such a method. Attention is also invited to the provisions in Section 33 of the Canadian Charter of Human Rights. Respondents in this behalf adopt the supplementary submission of Senior Counsel T.R. Andhyarujina.

136. It is submitted that this Hon'ble Court has clearly laid down that the right to property is not part of the basic structure. It has further been held by this Hon'ble Court in *State of Kerala v. Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.*⁶², SCC at p. 727 that "In fact in *Balmadies case*¹², referred to above, the acquisition of forests owned by jammies was set aside on the sole ground that the impugned law on the material on record did not indicate that the transfer of forests from the jammies to the Government was linked in any way with a scheme of agrarian reform or for betterment of village economy." (emphasis supplied)

137. The standards for review of a constitutional amendment is that of the basic structure test which, if it pertains to a fundamental right, must be such a "shocking betrayal" of the quintessence of the concerned right. As held by Krishna Iyer, J. in *Bhim Singhji case*²⁸ (SCC at p. 186, para 20) "Therefore, what is a betrayal of the basic feature is not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice. If a legislation does go that far it shakes the democratic foundation and must suffer the death penalty."

IV. Mr T.R. Andhyarujina, Senior Advocate, on behalf of the State of Tamil Nadu

Binding nature of the majority judgment in *Kesavananda Bharati case* of thirteen Judges on Article 31-B

138. In the first place, it is submitted that the decision of the Thirteen-Judge Bench in *Kesavananda Bharati case*¹ by a majority 7 to 6 is that Article 31-B read with the Ninth Schedule is constitutionally valid.

139. *Kesavananda Bharati case*⁴ considered the validity of the Twenty-ninth Amendment Act, 1972 which introduced Items 65 and 66 into the Ninth Schedule viz., the Kerala Land Reforms (Amendment) Act, 1969 and the Kerala Land Reforms (Amendment) Act, 1971. The "view of the majority" stated by 9 out of thirteen Judges is that "the Constitution (Twenty-ninth Amendment) Act, 1971 is valid". (SCC p. 1007).

62 (1973) 2 SCC 713

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- a 140. Khanna, J. who held that the constituent power could not alter the basic structure of the Constitution nevertheless held:
- "I have been able to find no infirmity in the Constitution (Twenty-ninth Amendment) Act." (SCC p. 822, para 1536)
141. If Article 31-B suffered from violating the basic structure, Khanna, J. would have declared that Article 31-B was unconstitutional as he did for the second part of Article 31-C.
- b 142. Six other Judges viz. Ray, Palekar, Mathew, Baig, Dwivedi and Chandrachud, JJ. held that there were no limitations on the constituent power to amend the Constitution and hence found that the Twenty-ninth Amendment Act was valid.
- c 143. The minority of 6 Judges viz. Sikri, C.J., para 472, Shelat, J., para 607, Grover, J., Hegde, J., para 508, Mukherjee, J., para 404 and Jaganmohan Reddy, J., para 1214 held that later constitutional Benches would decide whether the impugned Acts inserted into the Ninth Schedule by the Twenty-ninth Amendment were valid. Sikri, C.J. went further and held that Article 31-B and the Ninth Schedule was bad as it protects statutes even if they take away fundamental right (SCC p. 404, para 469).
- d 144. Significantly, the summary of "the majority view" at p. 1007 also does not state that the Kerala Acts in the Twenty-ninth Amendment Act would have to be examined by the Court for their validity. The two Kerala Acts in the Twenty-ninth Amendment Act were not thereafter considered for their validity.
145. It is thus clear that the majority view in *Kesavananda Bharati*⁴ is that Article 31-B and the Ninth Schedule is a permissible constitutional device and there is no infirmity in it. The position was summarised by Ray, C.J. in *Indira Gandhi v. Raj Narain*⁵ (SCC p. 66, para 152).
- e 146. After 1973, the following decisions of this Court applied Article 31-B as *per se* protecting the impugned Act in the Ninth Schedule:
- (1) *Godavari Sugar Mills v. S.B. Kamble*²³ (11.R. Khanna, P.N. Bhagwati and P.K. Goswami, JJ.) per Khanna, J. held that the Maharashtra Agricultural Land (Ceilings or Holdings) Act was fully protected by its inclusion in the Ninth Schedule by the Constitution (Seventeenth Amendment) Act, 1964.
- f (2) *State of Maharashtra v. M.S. Padvi*³⁸ (7 Judges), per Bhagwati, J., held that a law declared unconstitutional by the High Court was validated by its insertion into the Ninth Schedule by the Constitution (Fortieth Amendment) Act, 1976.
- (3) *Prag Ice v. Union of India*²⁶ (7 Judges) per Chandrachud, J., SCC at p. 485 held that the Essential Commodities Act put in the Ninth Schedule by the Fortieth Amendment Act, 1976 protected it from the challenge of fundamental rights under Part III.
- g In none of these cases (which were post-1973) was Article 31-B doubted as giving protection to the scheduled Act and none of the scheduled Acts were required to be examined if it violated the basic structure.
147. There is no consideration of the binding effect of the majority judgments in *Kesavananda Bharati case*⁴ in either *Waman Rao v. Union of India*⁶, SCC at p. 397
- h by Chandrachud, C.J., or in *Minerva Mills*⁹ by Bhagwati, J. (SCC at p. 683, para 91) both of which were by 5 Judges.

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Nor do these cases even refer to *Godavari Sugar Mills case*²³, *Padvi case*³⁸ (7 Judges) or *Prag Ice case*²⁶ (7 Judges). a

148. In effect *sub silentio* ignoring the binding decision of *Kesavananda Bharati*⁴ on Article 31-B, both *Waman Rao*^{5,6} and *Minerva Mills*⁹ have adopted the minority view of 6 Judges in *Kesavananda Bharati case*⁴ that Article 31-B is valid but the specified Acts/regulations in the Ninth Schedule have to be examined, if they damage or destroy the basic structure.

Validity of Article 31-B and the Ninth Schedule res integra b

149. On the basis that *Kesavananda Bharati case*⁴ did not decide the validity of Article 31-B and it was *res integra* after the criterion of the limitation of the basic structure, the position will be thus:

Fundamental right

If the inconsistency of a protected Act with a particular fundamental right is only its abridgement (e.g. Article 14) but does not abrogate or destroy or damage the fundamental right, Article 31-B will give protection to the inconsistency. If the inconsistency is such that it abrogates or destroys or damages the particular fundamental right, the Act will be declared as void for that reason. c

150. The correct position is given by Mathew, J. in *Indira Gandhi*⁷, SCC at p. 141, paras 356 to 358. This is also the view of Bhagwati, J. in *Minerva Mills*⁹, SCC at p. 686, para 91 and of Chandrachud, C.J., in *Waman Rao*⁶, SCC at p. 397, para 51 read with p. 399, para 55 and the conclusion at p. 403, para 63. d

151. The effect of the application of the limitation of the basic structure to a scheduled Act is that Article 31-B read with the Ninth Schedule is no longer not subject to judicial review. Judicial review is, therefore, very much present.

*Waman Rao*⁶, para 51 correct in all respects

152. It is not correct to rewrite para 51 of *Waman Rao*⁶ in the manner sought to be done by the petitioners. The last sentence in para 51 is crucial and cannot be rewritten to refer without any context suddenly to "a post-1973 non-Article 31-B Amendment of the Constitution". *Waman Rao*⁶ was only considering the validity of Article 31-A (which was held fully protected at all times) and Article 31-B which was held not protected after 24-4-1973, and Article 31-C (first part) which was protected at all times. No other Constitution Amendments came up for consideration in *Waman Rao*⁶ or were in contemplation. e f

153. It is not at all correct that the last sentence of para 55 requires to be re-read to apply only to "a post-1973 non-Article 31-B constitutional amendment".

Relationship between judicial review and the basic structure or framework of the Constitution

154. In the first place, it is necessary to distinguish between the necessity for the judiciary in a written Constitution and judicial review by the judiciary. The existence of the judiciary is part of the basic framework of the Constitution. The constituent power of Parliament under Article 368 of the Constitution cannot abrogate the existence of the judiciary. g

155. On the other hand, the power of judicial review is a power of the judiciary over certain matters. There is no judicial review in absolute terms given to the judiciary under the Constitution. h

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- a The Constitution itself has provisions for specifically excluding judicial review in certain matters e.g. repealed Articles 31(4) and 31(6), present Article 74(2), Article 33, Article 103(1), Article 105(2), Article 122(1), Article 136(2), Article 262(2), Article 227(4), Article 329(a) and Article 363. The exclusion of judicial review by the Constitution itself in certain fields shows that judicial review is not in absolute terms and there is a necessity to limit it in certain areas. Chandrachud, J. in *Indira Gandhi case*⁷ said:
- b "These provisions show that the Constitution did not regard judicial review as an indispensable measure of legality or propriety of *every determination*." (per Chandrachud, J., p. 253, para 666)
156. In *Kesavananda Bharati case*⁴ there is no mention of the feature of judicial review *as such* being part of the basic structure.
- c 157. Khanna, J. found that the first part of Article 31-C was not unconstitutional though on its plain terms it eliminated judicial review in respect of laws which gave effect to the directive principles in Article 39(b) and Article 39(c) of the Constitution or breach of Articles 14, 19 and 31. (SCC p. 812, para 1518)
158. However, he held that the second part of the article had peculiar vices.
- Article 31-C contained an unchallengeable declaration by any legislature including a State Legislature that a law was giving effect to these directive principles.
- d This would provide,
- "The cover for making laws with a regional bias even though such laws imperil the oneness of the nation and contain seeds of national disintegration." (p. 814, para 1519).
159. Khanna, J. held:
- e "In empowering a State Legislature to make laws violative of Articles 14, 19 and 31 of the Constitution and in further empowering the State Legislature to make laws immune from attack on the ground of being violative of Articles 14, 19 and 31, by inserting the requisite declaration, the authority vested with the power to make amendment under Article 368 (*viz.* the prescribed majority in each House of Parliament) *has, in effect, delegated or granted the power of making amendment in important respects to a State Legislature.*" (p. 817, para 1526)
- f Summing up, he held:
- "In my opinion, the second part of Article 31-C is liable to be quashed on the following grounds:
- (1) It gives a carte blanche to the legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration. Article 31-C taken along with its second part gives in effect the power to the legislature, including a State Legislature, to amend the Constitution.
- (2) The legislature has been made the final authority to decide as to whether the law made by it is for the objects mentioned in Article 31-C. The vice of the second part of Article 31-C lies in the fact that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the legislature precludes a party from showing that the law is not for that object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by the
- g
- h

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legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The second part of Article 31-C goes beyond the permissible limit of what constitutes amendment under Article 368. (p. 822, para 1535-A) a

Thus, it was a particular type of elimination of judicial review from the second part of Article 31-C which was held to be violative of the basic structure of the Constitution.

160. On the other hand, Khanna, J. specifically approved the exclusion of judicial review by Article 31-B in contradistinction to the elimination of judicial review by a declaration by the legislature under the second part of Article 31-C. The relevant part of Khanna, J.'s judgment is at pp. 813 to 825. b

161. Judicial review is also excluded by Article 31-A and Article 31-C (first part).

Article 31-A excludes judicial review of certain laws from the application of Articles 14, 19 and 31. Article 31-A was held not violative of the basic structure unanimously in *Waman Rao*^{5,6} and *Minerva Mills case*⁹ (post-1973). c

162. Likewise, the first part of unamended Article 31-C which excluded judicial review of certain laws was held by a majority of 7 to 6 not to destroy the basic structure of the Constitution in *Kesavananda Bharati case*⁴ and affirmed in *Waman Rao*^{5,6} and *Minerva Mills case*⁹ (post-1973) as valid. The upholding of the validity of Articles 31-A and 31-C shows that judicial review of this type may legitimately be excluded. d

163. In *Indira Gandhi v. Raj Narain*⁷ also there is no proposition that judicial review as such is a basic structure of the Constitution and cannot be excluded. In fact, even in respect of as vital a matter as election disputes, Ray, C.J., and Chandrachud, J. held that there was no necessity of judicial review.

Therefore, after the theory of basic structure which came to be established in *Kesavananda Bharati case*⁴, it is only that kind of judicial review whose elimination would destroy or damage the basic structure of the Constitution that is beyond the constituent power. In every case where a constituent power excludes judicial review, the basic structure of the Constitution is not abrogated. The question to be asked in each case is, does the particular exclusion alter the basic structure of the Constitution. e

For example, Article 243-O made by the Seventy-third Amendment, 1993 on 20-4-1993 (i.e. post-1973) bars the interference by courts in electoral matters relating to electoral rolls and elections to Panchayat. Such an exclusion of judicial review does not in any manner affect the basic structure of the Constitution. f

164. On the other hand, an amendment introducing clause (2)(d) of Article 323-A and clause (3)(d) of Article 232-B of the Constitution by the Constitution (Forty-second Amendment) Act, 1976 which excluded jurisdiction of the High Courts and the Supreme Court under Articles 226 and 227 and Article 32 of the Constitution was declared unconstitutional as altering the basic structure of the Constitution as the entire jurisdiction of the High Courts and the Supreme Court was abrogated. (*L. Chandra Kumar v. Union of India*¹⁹). g

165. Judicial review under the Constitution is comprehensive in nature. The broad areas are: h

1. Over legislative competence of Parliament and the State Legislatures;

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- a 2. Over executive and administrative actions;
 3. Over specific limitations in the Constitution e.g. Articles 265, 286, 301, etc.;
 4. Over limits of various authorities under the Constitution, and;
 5. Breach of Part III of the Constitution.
166. Giving immunity of Part III to specified laws from judicial review does not abrogate judicial review from the Constitution. Judicial review remains with the courts but with its exclusion over certain enacted laws to which Part III will not apply. The effect of Article 31-B is to remove the fetter of Part III but does not oust the court's jurisdiction.
167. As constitutional amendment of Article 31-B read with the Ninth Schedule does not make any change in the court's jurisdiction, it does not require ratification as held in *Sunkari Prasad*¹ and *Sajjan Singh*².
- c 168. Justice O.W. Holmes said in a celebrated passage—
"I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several States."
[Holmes, *Collected Legal Papers* (1920), 295-96].
 - d 169. The exclusion of judicial review of specified Acts in the Ninth Schedule is not done by the State Legislatures making laws conforming either to certain types of laws or to certain directive principles as in the case of Article 31-A and Article 31-C but the very enacted Act is the subject-matter of Parliament's consideration. Parliament, by a special majority of two-thirds of each House, on a consideration, makes the already enacted law to which, in its opinion, the provisions of Part III should not apply. No sense of irresponsibility can be ascribed or attributed to the representatives of the people.
 - e 170. Nor can a power be denied because of the possibility of its abuse. Rhetorical arguments of misuse of power (e.g. "abyss" or "laundry bag" of the Ninth Schedule, etc.) are always appealing but are irrelevant to the test of power. The width of a power to be considered is different from the possibility of its abuse. In *Kesavananda Bharati*³ 7 Judges have held that it is not a legitimate mode of construing a power to consider its worst use or abuse. See per Ray, J., pp. 565-66, paras 948-51; per Jagannathan Reddy, J., p. 613, para 1103; per Khanna, J., p. 762, paras 1416-17; per Mathew, J., p. 863, para 1662; per Dwivedi, J., p. 947, paras 1949-52; per Chandrachud, J., p. 991, para 2093 and per Palekar, J., p. 690, para 1263.
 - f

Conclusion

- g 171. In the final analysis, it is submitted that the power to include Acts in the Ninth Schedule has been entrusted to the peoples' representatives in Parliament. Like with other vast powers entrusted to them, we must presume that they would be exercised in a responsible way.
- h 172. The peoples' representatives under our Constitution are vested with larger powers over the lives of the nation. No assumption can be made that they will be misused. From 1950, under the interpretation given by this Court in *Gopalan case*⁶³ there was no protection given in matters of life and personal liberty except by such

⁶³ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 : (1950) 51 Cri LJ 1383

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law as Parliament would make till 28 years later this Court in *Maneka Gandhi case*⁶⁴ introduced for all practical purposes the due process of law in matters relating to life and personal liberty. a

For over 23 years with the full amending power up to 1973 no abuse of amending power can be said to have made.

173. The analysis of the Ninth Schedule Acts show that the bulk of the Acts are those relating to land reforms. Even in respect of other Acts, it cannot be said that any of the Acts are such that they are oppressive or destroy the personal liberties of citizens. b

174. Parliament can be trusted with the power to insert Acts in the Ninth Schedule and not to misuse the power as indeed it has not done so far.

Further Submissions:

Relationship between Article 31-A and Article 31-B

175. Articles 31-A and 31-B were enacted originally by the First Amendment Act in 1951. It was said, therefore, that Articles 31-A and 31-B were enacted to serve the same purpose of making legislation falling within a certain category, namely, relating to agrarian reforms. c

176. However, from 1955, Article 31-A no longer exclusively dealt with estates or agrarian reforms. At the same time, by the same Constitution (Fourth Amendment) Act, six other Acts were included in the Ninth Schedule, namely, Items 14 to 20 which had no connection with land agrarian reforms. d

177. Thus, after the Constitution (Fourth Amendment) Act, 1955 Article 31-B had no similarity even to the contents of Article 31-A. It is significant that the Constitution (Fourth Amendment) Act, 1955 was piloted in Parliament on 17-12-1954 by Pt. Jawaharlal Nehru himself who had earlier stated at the time of the First Amendment in 1951 that "the Ninth Schedule consisted of a particular type of legislation generally speaking and that another type should not come in..." e

178. It is, therefore, only partially true that Article 31-B was adopted only as a means of giving definite and assured protection to legislation already protected under Article 31-A. From 1955 onwards, this was no longer true as Article 31-A itself changed its character.

179. An analysis of the 285 entries in the Ninth Schedule inserted up to 1995 shows: f

- (1) 17 Acts are not relatable to any clause in Article 31-A.
- (2) 11 Acts are relatable to Articles 31-A(b) to (e).
- (3) Remaining 257 Acts are relatable to land reforms/land acquisition.

Re: Submission of logical follow up from invalidation of Article 31-C by Constitution (Forty-second Amendment) Act

180. It has been argued that if the majority judgment in *Minerva Mills case*⁹ found Article 31-C as amended by the Forty-second Amendment Act, 1976 to be an invalid constitutional amendment, logically Article 31-B which according to the petitioners has a wider reach cannot be valid. g

181. The factual foundations of this argument is not correct. Article 31-C as amended by the Constitution (Forty-second Amendment) Act was held to be damaging the basic structure of the Constitution by the majority judgment in h

⁶⁴ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

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- a *Minerva Mills Ltd. case*⁹ (Bhagwati, J. dissenting) because the Forty-second Amendment gave absolute primacy to the whole of Part IV over Part III and the harmony between the fundamental rights and directive principles which was an essential feature of the basic structure of the Constitution was damaged [see, Chandrachud, C.J. in *Minerva Mills case*⁹, SCC at p. 654, para 56].

Re: Argument that Article 31-B renders the Constitution "uncontrolled"

- b 182. It is been argued that the continued retention of Article 31-B makes the Constitution cease to be "a controlled Constitution". This is total misunderstanding of the concept of "controlled" and "uncontrolled" Constitution. An uncontrolled Constitution (corresponding to a flexible Constitution) does not have any special procedure for amending the Constitution in respect of any part of the Constitution whether a vital part or an innocuous part of it. Thus, as it has been said in England, Parliament may amend the Bill of Rights with as much ease and without any special procedure as the Dogs Act or the Dentists Act. On the other hand, in a controlled Constitution, the amendment of the Constitution cannot be made by an ordinary law but by special procedure which renders the Constitution controlled (or rigid). This distinction was made in the leading Privy Council case of *McCawley v. King*⁶⁵.
- c

183. See the distinction between "controlled" and "uncontrolled" Constitutions in the following parts of *Kesavananda Bharati case*⁴:

- d (a) Ray, J. at pp. 521-22, para 782.
(b) Khanna, J. at pp. 735-36, para 1345.
(c) Palekar, J. at pp. 670-71, para 1222; at pp. 682-83, para 1243.
(d) Mathew, J. at pp. 832-33, para 1569; at p. 839, para 1592.
(e) Shelat and Grover, JJ. at pp. 408-409, para 486; pp. 432, para 540.
(f) Dwivedi, J. at pp. 927, para 1878; pp. 939, para 1920.
e (g) Chandrachud, J. at pp. 985, paras 2073-2074.

Wrong foundation of the petitioners' submissions

- f 184. Besides this, the petitioners lay a wholly wrong foundation for their arguments. They suggest that each and every article of Part III of the Constitution in its entirety is excluded by Article 31-B as if Part III does not exist. This is totally erroneous. Article 31-B gives immunity only to specified laws in the Ninth Schedule from the challenge of fundamental rights in Part III. It does not wipe out Part III from the Constitution.

Re: Submission of absence of "criteria or standard" in Article 31-B

- g 185. The petitioners submit that there is no criterion or standard in Article 31-B for inclusion of Acts in the Ninth Schedule. The answer is that the criterion is that those Acts which in Parliament's considered opinion are necessary for giving immunity from Part III and which if not given would result in long and dilatory challenge and would frustrate the objectives of the scheduled Act are included in the Ninth Schedule. Article 31-B affords a better protection than leaving all legislatures in India free to make laws with reference to any subject related to Article 31-A(1) and making fundamental rights immune to the challenge of fundamental rights and by Article 31-C leaving all legislatures to make laws in pursuance of the directive
- h

65 1920 AC 691 : 89 T.J. PC 130 : 123 LT 177 (PC)

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principles of State Policy in Articles 39(b) and (c) and making them immune. As Khanna, J. observed in *Kesavananda Bharati*⁴ Parliament's scrutiny of the specified Acts by two-thirds majority is a solid protection which makes Article 31-B unobjectionable (see Khanna, J. in *Kesavananda Bharati*⁴, SCC at p. 815, para 1522; p. 818, para 1539; and p. 820, para 1533). a

186. Parliament does not recklessly put in Acts in the Ninth Schedule. The petitioners have not shown that any Act in the Schedule is oppressive or destructive of fundamental freedom. As shown earlier, out of the present Ninth Schedule of 285 Acts, 257 Acts are relatable estate and land reform, etc. 11 Acts are relatable to Articles 31-A(b) to (e). b

187. A complete analysis of the Acts and Regulations in the Ninth Schedule is annexed to these submissions as Annexure I.

Submission that after 24-4-1973, Article 31-B ceases to have efficacy or must cease

188. There is no legal basis for the proposition that Article 31 "has spent itself" or "has become obsolete" or because "it has accomplished its purpose". Even an ordinary statute does not cease to operate by desuetude, much less a part of the Constitution which is a living document for all times can be so condemned or the court can be invited to do so. c

Analogous provision to Article 31-B in Canada

189. A significant analogy to Article 31-B exists in the Canadian Constitution Act, 1982 which introduced the Canadian Charter of Rights and Freedoms. d

190. Various rights and freedoms are guaranteed in the Charter. However, the Charter itself carries an exception in Section 33 to exclude rights and freedoms by an express declaration in an Act of Parliament or of the legislature of the province by which that Act will operate notwithstanding certain rights and provisions of the Charter.

191. The material portions of Section 33 are as follows: e

33. *Exception where express declaration.*—(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in Section 2 or Sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. f

192. Section 33 allows Parliament or a Provincial Legislature to limit the rights granted in Sections 2 (fundamental freedoms) and 7 to 15 (legal and equality rights) of the Charter. This can be done by means of an ordinary statute, passed *either prior to a constitutional challenge*, or in response to a finding of unconstitutionality by a court. If Section 33 is invoked, there is no requirement that the legislation be reasonable or demonstrably justified under Section 1 of the Charter. Moreover, when Section 33 is invoked, courts have no ability to review the legislation, except with respect to compliance with Section 33 itself. g

193. This shows there is nothing per se objectionable in other democratic Constitutions to the legislature excluding fundamental freedoms to a particular Act if the legislature deems fit. h

The Judgment* of the Court was delivered by

- a Y.K. SABHARWAL, C.J.— In these matters we are confronted with a very important yet not very easy task of determining the nature and character of protection provided by Article 31-B of the Constitution of India, 1950 (for short "the Constitution") to the laws added to the Ninth Schedule by amendments made after 24-4-1973. The relevance of this date is for the reason that on this date the judgment in *Kesavananda Bharati v. State of Kerala*¹ was pronounced propounding the doctrine of basic structure of the Constitution to test the validity of constitutional amendments.
- b

Re: Order of reference

- c 2. The order of reference made more than seven years ago by a Constitution Bench of five Judges is reported in *I.R. Coelho v. State of T.N.*² (14-9-1999). The Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 (the Janmam Act), insofar as it vested forest lands in the Janmam estates in the State of Tamil Nadu, was struck down by this Court in *Balmadies Plantations Ltd. v. State of T.N.*³ because this was not found to be a measure of agrarian reform protected by Article 31-A of the Constitution. Section 2(c) of the West Bengal Land Holding Revenue Act, 1979 was struck down by the Calcutta High Court as being arbitrary and, therefore, unconstitutional and the special leave petition filed against the judgment by the State of West Bengal was dismissed. By the Constitution (Thirty-fourth Amendment) Act, the Janmam Act, in its entirety, was inserted in the Ninth Schedule. By the Constitution (Sixty-sixth Amendment) Act, the West Bengal Land Holding Revenue Act, 1979, in its entirety, was inserted in the Ninth Schedule. These insertions were the subject-matter of challenge before a five-Judge Bench.
- d
- e

3. The contention urged before the Constitution Bench was that the statutes, inclusive of the portions thereof which had been struck down, could not have been validly inserted in the Ninth Schedule.

- f 4. In the referral order, the Constitution Bench observed that, according to *Waman Rao v. Union of India*⁴ amendments to the Constitution made on or after 24-4-1973 by which the Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of Parliament since they damage the basic or essential features of the Constitution or its basic structure. The decisions in *Minerva Mills Ltd. v. Union of India*⁵ and *Bhim Singhji v. Union of India*⁶ were also noted and it
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* Ed.: The unanimous opinion of the nine-Judge Bench has been delivered by Chief Justice Y.K. Sabharwal.

1 (1973) 4 SCC 225

2 (1999) 7 SCC 580

3 (1972) 2 SCC 133

4 (1981) 2 SCC 362

5 (1980) 3 SCC 625

6 (1981) 1 SCC 166

h

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was observed that the judgment in *Waman Rao*⁴ needs to be reconsidered by a larger Bench so that the apparent inconsistencies therein are reconciled and it is made clear whether an Act or regulation which, or a part of which, is or has been found by this Court to be violative of one or more of the fundamental rights conferred by Articles 14, 19 and 31 can be included in the Ninth Schedule or whether it is only a constitutional amendment amending the Ninth Schedule which damages or destroys the basic structure of the Constitution that can be struck down. While referring these matters for decision to a larger Bench, it was observed that preferably the matters be placed before a Bench of nine Judges. This is how these matters have been placed before us.

Broad question

5. The fundamental question is whether on and after 24-4-1973 when the basic structure doctrine was propounded, it is permissible for Parliament under Article 31-B to immunise legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Court.

Development of the law

6. First, we may consider, in brief, the factual background of framing of the Constitution and notice the developments that have taken place almost since inception in regard to interpretation of some of the articles of the Constitution.

7. The Constitution was framed after an in-depth study of manifold challenges and problems including that of poverty, illiteracy, long years of deprivation, inequalities based on caste, creed, sex and religion. The independence struggle and intellectual debates in the Constituent Assembly show the value and importance of freedoms and rights guaranteed by Part III and State's welfare obligations in Part IV. The Constitutions of various countries including that of the United States of America and Canada were examined and after extensive deliberations and discussions the Constitution was framed. The fundamental rights chapter was incorporated providing in detail the positive and negative rights. It provided for the protection of various rights and freedoms. For enforcement of these rights, unlike Constitutions of most of the other countries, the Supreme Court was vested with original jurisdiction as contained in Article 32.

8. The High Court of Patna in *Kameshwar Singh v. State of Bihar*⁷ held that a Bihar legislation relating to land reforms was unconstitutional while the High Courts of Allahabad and Nagpur upheld the validity of the corresponding legislative measures passed in those States. The parties aggrieved had filed appeals before the Supreme Court. At the same time, certain zamindars had also approached the Supreme Court under Article 32 of the Constitution. It was, at this stage, that Parliament amended the

⁴ *Waman Rao v. Union of India*, (1981) 2 SCC 362

⁷ AIR 1951 Pat 91 : II.R 30 Pat 454

- Constitution by adding Articles 31-A and 31-B to assist the process of legislation to bring about agrarian reforms and confer on such legislative measures immunity from possible attack on the ground that they contravene the fundamental rights of the citizen. Article 31-B was not part of the original Constitution. It was inserted in the Constitution by the Constitution (First Amendment) Act, 1951. The same amendment added after the Eighth Schedule a new Ninth Schedule containing thirteen items, all relating to land reform laws, immunising these laws from challenge on the ground of contravention of Article 13 of the Constitution. Article 13, inter alia, provides that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention thereof shall, to the extent of the contravention, be void.

9. Articles 31-A and 31-B read as under:

- "31-A. *Saving of laws providing for acquisition of estates, etc.*—(1) Notwithstanding anything contained in Article 13, no law providing for—
- (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
 - (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
 - (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
 - (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or
 - (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,
- shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19:
- Provided that where such law is a law made by the legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:
- Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.
- (2) In this article,—
- (a) the expression 'estate', shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the

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existing law relating to land tenures in force in that area and shall also include—

(i) any *jagir*, *inam* or *muafi* or other similar grant and in the States of Tamil Nadu and Kerala, any *janmam* right; a

(ii) any land held under ryotwari settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans; b

(b) the expression 'rights', in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue.

31-B. *Validation of certain Acts and Regulations.*—Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent legislature to repeal or amend it, continue in force." d

10. The constitutional validity of the First Amendment was upheld in *Sankari Prasad Singh Deo v. Union of India*⁸.

11. The main object of the amendment was to fully secure the constitutional validity of zamindari abolition laws in general and certain specified Acts in particular and save those provisions from the dilatory litigation which resulted in holding up the implementation of the social reform measures affecting large number of people. Upholding the validity of the amendment, it was held in *Sankari Prasad*⁸ that Article 13(2) does not affect amendments to the Constitution made under Article 368 because such amendments are made in the exercise of constituent power. The Constitution Bench held that to make a law which contravenes the Constitution constitutionally valid is a matter of constitutional amendment and as such it falls within the exclusive power of Parliament. e

12. The constitutional validity of the Acts added to the Ninth Schedule by the Constitution (Seventeenth Amendment) Act, 1964 was challenged in petitions filed under Article 32 of the Constitution. Upholding the constitutional amendment and repelling the challenge in *Sajjan Singh v. State of Rajasthan*⁹ the law declared in *Sankari Prasad*⁸ was reiterated. It was noted that Articles 31-A and 31-B were added to the Constitution realising that State legislative measures adopted by certain States for giving effect to the policy of agrarian reforms have to face serious challenge in the courts of law on the ground that they contravene the fundamental rights guaranteed to the citizen by Part III. The Court observed that the genesis of the amendment f

⁸ AIR 1951 SC 458 : 1952 SCR 89

⁹ AIR 1965 SC 815 : (1965) 1 SCR 933

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- a made by adding Articles 31-A and 31-B is to assist the State Legislatures to give effect to the economic policy to bring about much needed agrarian reforms. It noted that if pith and substance test is to apply to the amendment made, it would be clear that Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfilment of the socio-economic policy viz. a policy in which the party in power believes. The Court further noted that the impugned Act does not purport to change the provisions of Article 226 and it cannot be said even to have that effect directly or in any appreciable measure. It noted that the object of the Act was to amend the relevant articles in Part III which confer fundamental rights on citizens and as such it falls under the substantive part of Article 368 and does not attract the provision of clause (b) of that proviso. The Court, however, noted, that if the effect of the amendment made in the fundamental rights on Article 226 is direct and not incidental and if in significant order, different considerations may perhaps arise.

- c 13. Hidayatullah and J.R. Mudholkar, JJ. concurred with the opinion of Gajendragadkar, C.J. upholding the amendment but, at the same time, expressed reservations about the effect of possible future amendments on fundamental rights and basic structure of the Constitution. Mudholkar, J. questioned that: (*Sajjan Singh case*⁹, AIR p. 864, para 58)

- d "58. It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Article 368?"

- e 14. In *Golak Nath v. State of Punjab*¹⁰ a Bench of 11 Judges considered the correctness of the view that had been taken in *Sankari Prasad*⁸ and *Sajjan Singh*⁹. By majority of six to five, these decisions were overruled. It was held that the constitutional amendment is "law" within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void. It was declared that Parliament will have no power from the date of the decision (27-2-1967) to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

- f 15. Soon after *Golak Nath case*¹⁰ the Constitution (Twenty-fourth Amendment) Act, 1971, the Constitution (Twenty-fifth Amendment) Act, 1971, the Constitution (Twenty-sixth Amendment) Act, 1971 and the Constitution (Twenty-ninth Amendment) Act, 1972 were passed.

- g 16. By the Constitution (Twenty-fourth Amendment) Act, 1971, Article 13 was amended and after clause (3), the following clause was inserted as Article 13(4):

"13. (4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368."

- h ⁹ *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 : (1965) 1 SCR 933

¹⁰ AIR 1967 SC 1643 : (1967) 2 SCR 762

⁸ *Sankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458 : 1952 SCR 89

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17. Article 368 was also amended and in Article 368(1) the words "in exercise of its constituent powers" were inserted.

18. The Constitution (Twenty-fifth Amendment) Act, 1971 amended the provision of Article 31 dealing with compensation for acquiring or acquisition of properties for public purposes so that only the amount fixed by law need to be given and this amount could not be challenged in court on the ground that it was not adequate or in cash. Further, after Article 31-B of the Constitution, Article 31-C was inserted, namely:

"31-C. *Saving of laws giving effect to certain directive principles.*— Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy."

Provided that where such law is made by the legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

(emphasis supplied)

19. The Constitution (Twenty-sixth Amendment) Act, 1971 omitted from the Constitution Article 291 (privy purses) and Article 362 (rights and privileges of rulers of Indian States) and inserted Article 363-A after Article 363 providing that recognition granted to rulers of Indian States shall cease and privy purses be abolished.

20. The Constitution (Twenty-ninth Amendment) Act, 1972 amended the Ninth Schedule to the Constitution inserting therein two Kerala Amendment Acts in furtherance of land reforms after Entry 64, namely, Entry 65— Kerala Land Reforms Amendment Act, 1969 (Kerala Act 35 of 1969); and Entry 66—Kerala Land Reforms Amendment Act, 1971 (Kerala Act 35 of 1971).

21. These amendments were challenged in *Kesavananda Bharati case*¹. The decision in *Kesavananda Bharati case*¹ was rendered on 24-4-1973 by a thirteen-Judge Bench and by majority of seven to six *Golak Nath case*¹⁰ was overruled. The majority opinion held that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution. The Constitution (Twenty-fourth Amendment) Act, 1971 was held to be valid. Further, the first part of Article 31-C was also held to be valid. However, the second part of Article 31-C that

"no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy"

was declared unconstitutional. The 29th Constitution Amendment was held valid. The validity of the 26th Amendment was left to be determined by a Constitution Bench of five Judges.

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

¹⁰ *Golak Nath v. State of Punjab*, AIR 1967 SC 1643 : (1967) 2 SCR 762

22. The majority opinion did not accept the unlimited power of Parliament to amend the Constitution and instead held that Article 368 has implied limitations. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.

23. Another important development took place in June 1975, when the Allahabad High Court set aside the election of the then Prime Minister Mrs Indira Gandhi to the fifth Lok Sabha on the ground of alleged corrupt practices. Pending appeal against the High Court judgment before the Supreme Court, the Constitution (Thirty-ninth Amendment) Act, 1975 was passed. Clause (4) of the amendment inserted Article 329-A after Article 329. Sub-clauses (4) and (5) of Article 329-A read as under:

"329-A. (4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, insofar as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross-appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4)."

24. Clause (5) of the Amendment Act inserted after Entry 86, Entries 87 to 124 in the Ninth Schedule. Many of the entries inserted were unconnected with land reforms.

25. In *Indira Nehru Gandhi v. Raj Narain*¹¹ the aforesaid clauses were struck down by holding them to be violative of the basic structure of the Constitution.

26. About two weeks before the Constitution Bench rendered the decision in *Indira Gandhi case*¹¹ internal Emergency was proclaimed in the country. During the Emergency from 26-6-1975 to March 1977, Article 19 of the Constitution stood suspended by virtue of Article 358 and Articles 14 and 21 by virtue of Article 359. During internal Emergency, Parliament passed the Constitution (Fortieth Amendment) Act, 1976. By clause (3) of the said amendment, in the Ninth Schedule, after Entry 124, Entries 125 to 188 were inserted. Many of these entries were unrelated to land reforms.

27. Article 368 was amended by the Constitution (Forty-second Amendment) Act, 1976. It, inter alia, inserted by Section 55 of the

¹¹ 1975 Supp SCC 1

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Amendment Act, in Article 368, after clause (3), the following clauses (4) and (5):

"368. (4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground. a

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article." b

28. After the end of internal Emergency, the Constitution (Forty-fourth Amendment) Act, 1978 was passed. Section 2, inter alia, omitted sub-clause (f) of Article 19 with the result that the right to property ceased to be a fundamental right and it became only legal right by insertion of Article 300-A in the Constitution. Articles 14, 19 and 21 became enforceable after the end of Emergency. Parliament also took steps to protect fundamental rights that had been infringed during the Emergency. The Maintenance of Internal Security Act, 1971 and the Prevention of Publication of Objectionable Matter Act, 1976 which had been placed in the Ninth Schedule were repealed. The Constitution (Forty-fourth Amendment) Act also amended Article 359 of the Constitution to provide that even though other fundamental rights could be suspended during the Emergency, rights conferred by Articles 20 and 21 could not be suspended. c

29. During Emergency, the fundamental rights were read even more restrictively as interpreted by the majority in *ADM, Jabalpur v. Shivakant Shukla*¹². The decision in *ADM, Jabalpur*¹² about the restrictive reading of right to life and liberty stood impliedly overruled by various subsequent decisions. d

30. The fundamental rights received enlarged judicial interpretation in the post-Emergency period. Article 21 which was given strict textual meaning in *A.K. Gopalan v. State of Madras*¹³ interpreting the words "according to procedure established by law" to mean only enacted law, received enlarged interpretation in *Maneka Gandhi v. Union of India*¹⁴. *A.K. Gopalan*¹³ was no longer good law. In *Maneka Gandhi*¹⁴ a Bench of seven Judges held that the procedure established by law in Article 21 had to be reasonable and not violative of Article 14 and also that fundamental rights guaranteed by Part III were distinct and mutually exclusive rights. e

31. In *Minerva Mills case*⁵ the Court struck down clauses (4) and (5) of Article 368 finding that they violated the basic structure of the Constitution. f

12 (1976) 2 SCC 521

13 AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cri LJ 1383

14 (1978) 1 SCC 248

5 *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

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32. The next decision to be noted is that of *Waman Rao*⁴. The developments that had taken place post-*Kesavananda Bharati case*¹ have been noticed in this decision.

33. In *Bhim Singhji*⁶ challenge was made to the validity of the Urban Land (Ceiling and Regulation) Act, 1976 which had been inserted in the Ninth Schedule after *Kesavananda Bharati case*¹. The Constitution Bench unanimously held that Section 27(1) which prohibited disposal of property within the ceiling limit was violative of Articles 14 and 19(1)(f) of Part III. When the said Act was enforced in February 1976, Article 19(1)(f) was part of fundamental rights chapter and as already noted it was omitted therefrom only in 1978 and made instead only a legal right under Article 300-A.

34. It was held in *L. Chandra Kumar v. Union of India*¹⁵ that power of judicial review is an integral and essential feature of the Constitution constituting the basic part, the jurisdiction so conferred on the High Courts and the Supreme Court is a part of inviolable basic structure of the Constitution of India.

Constitutional amendment of the Ninth Schedule

35. It would be convenient to note at one place, various constitutional amendments which added/omitted various Acts/provisions in the Ninth Schedule from Items 1 to 284. It is as under:

	"Amendment"	Acts/Provisions added
d	1st Amendment (1951)	1-13
	4th Amendment (1955)	14-20
	17th Amendment (1964)	21-64
	29th Amendment (1971)	65-66
e	34th Amendment (1974)	67-86
	39th Amendment (1975)	87-124
	40th Amendment (1976)	125-188
	47th Amendment (1984)	189-202
f	66th Amendment (1990)	203-257
	76th Amendment (1994)	257-A
	78th Amendment (1995)	258-284

Omissions

In 1978 Item 92 (the Internal Security Act) was repealed by the parliamentary Act.

In 1977 Item 130 (the Prevention of Publication of Objectionable Matter) was repealed.

In 1978 the 44th Amendment omitted Items 87 (the Representation of People Act), 92 and 130."

⁴ *Waman Rao v. Union of India*, (1981) 2 SCC 362

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

⁶ *Bhim Singhji v. Union of India*, (1981) 1 SCC 166

¹⁵ (1997) 3 SCC 261 : 1997 SCC (L&S) 577

Many additions are unrelated to land reforms.

36. The question is as to the scope of challenge to the Ninth Schedule laws after 24-4-1973. a

Article 32

37. The significance of jurisdiction conferred on this Court by Article 32 is described by Dr. B.R. Ambedkar as follows: (Constituent Assembly Debates, Vol. IX, p. 953)

"most important article without which this Constitution would be a nullity". b

Further, it has been described† as "the very soul of the Constitution and the very heart of it".

38. Reference may also be made to the opinion of Patanjali Sastri, C.J. in *State of Madras v. V.G. Row*¹⁶ to the following effect: (AIR p. 199, para 13) c

"This is especially true as regards the 'fundamental rights', as to which [the Supreme Court] has been assigned the role of a sentinel on the 'qui vive'. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute."

39. The jurisdiction conferred on this Court by Article 32 is an important and integral part of the basic structure of the Constitution of India and no Act of Parliament can abrogate it or take it away except by way of impermissible erosion of fundamental principles of the constitutional scheme, are settled propositions of Indian jurisprudence [see *Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India*¹⁷, *State of Rajasthan v. Union of India*¹⁸, *Krishna Swami v. Union of India*¹⁹, *Daryao v. State of U.P.*²⁰ and *L. Chandra Kumar*¹⁵.] d

40. In *S.R. Bommai v. Union of India*²¹ it was reiterated that the judicial review is a basic feature of the Constitution and that the power of judicial review is a constituent power that cannot be abrogated by judicial process of interpretation. It is a cardinal principle of our Constitution that no one can claim to be the sole judge of the power given under the Constitution and that its actions are within the confines of the powers given by the Constitution. e

41. It is the duty of this Court to uphold the constitutional values and enforce constitutional limitations as the ultimate interpreter of the Constitution. f

† Ed.: Also by Dr. Ambedkar in *Constituent Assembly Debates*, Vol. VII, p. 953. g

16 AIR 1952 SC 196 : 1952 SCR 597 : 1952 Cri LJ 966

17 (1981) 1 SCC 568

18 (1977) 3 SCC 592

19 (1992) 4 SCC 605

20 AIR 1961 SC 1457 : (1962) 1 SCR 574

15 *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261 : 1997 SCC (L&S) 577 h

21 (1994) 3 SCC 1

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Principles of construction

- a 42. The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law.

- b 43. The principle of constitutionalism is now a legal principle which requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers; it requires a diffusion of powers, necessitating different independent centres of decision-making. The principle of constitutionalism underpins the principle of legality which requires the courts to interpret
c legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.

Common law constitutionalism

- d 44. The protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism.

45. According to Dr. Amartya Sen, the justification for protecting fundamental rights is not on the assumption that they are higher rights, but that protection is the best way to promote a just and tolerant society.

- e 46. According to Lord Steyn, the judiciary is the best institution to protect fundamental rights, given its independent nature and also because it involves interpretation based on the assessment of values besides textual interpretation. It enables application of the principles of justice and law.

- f 47. Under the controlled Constitution, the principles of checks and balances have an important role to play. Even in England where Parliament is sovereign, Lord Steyn has observed that in certain circumstances, courts may be forced to modify the principle of parliamentary sovereignty, for example, in cases where judicial review is sought to be abolished. By this the judiciary is protecting a limited form of constitutionalism, ensuring that their institutional role in the Government is maintained.

Principles of constitutionality

- g 48. There is a difference between parliamentary and constitutional sovereignty. Our Constitution is framed by a Constituent Assembly which was not Parliament. It is in the exercise of law-making power by the Constituent Assembly that we have a controlled Constitution. Articles 14, 19, 21 represent the foundational values which form the basis of the rule of law. These are the principles of constitutionality which form the basis of judicial
h review apart from the rule of law and separation of powers. If in future, judicial review was to be abolished by a constitutional amendment, as Lord

Steyn says, the principle of parliamentary sovereignty even in England would require a relook. This is how law has developed in England over the years. It is in such cases that doctrine of basic structure as propounded in *Kesavananda Bharati case*¹ has to apply. a

49. Granville Austin has been extensively quoted and relied on in *Minerva Mills*⁵. Chandrachud, C.J. observed that to destroy the guarantees given by Part III in order to purportedly achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure. Fundamental rights occupy a unique place in the lives of civilised societies and have been described in judgments as "transcendental", "inalienable" and "primordial". They constitute the ark of the Constitution (*Kesavananda Bharati*¹ at SCC pp. 991, 999). The learned Chief Justice held that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution. It is to be traced for a deep understanding of the scheme of the Indian Constitution. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. "Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution." (emphasis supplied) (*Minerva Mills*⁵, SCC p. 654, para 57.) Further observes the learned Chief Justice, that the matters have to be decided not by metaphysical subtlety, nor as a matter of semantics, but by a broad and liberal approach. We must not miss the wood for the trees. A total deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can. The observations made in the context of Article 31-C have equal and full force for deciding the questions in these matters. Again the observations made in para 70 (SCC p. 659) are very relevant for our purposes. It has been observed that (*Minerva Mills case*⁵, para 70, p. 659) b c d e

"[I]f by a constitutional amendment, the application of Articles 14 and 19 is withdrawn from a defined field of legislative activity, which is reasonably in public interest, the basic framework of the Constitution may remain unimpaired. But if the protection of those articles is withdrawn in respect of an uncatalogued variety of laws, fundamental freedoms will become a 'parchment in a glass case' to be viewed as a matter of historical curiosity." f

These observations are very apt for deciding the extent and scope of judicial review in cases wherein entire Part III, including Articles 14, 19, 20, 21 and 32, stand excluded without any yardstick. g

50. The developments made in the field of interpretation and expansion of judicial review shall have to be kept in view while deciding the applicability of the basic structure doctrine—to find out whether there has h

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

⁵ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

been violation of any fundamental right, the extent of violation, does it destroy the balance or it maintains the reasonable balance.

- a 51. The observations of Bhagwati, J. in *Minerva Mills case*⁵ show how clause (4) of Article 368 would result in enlarging the amending power of Parliament contrary to the dictum in *Kesavananda Bharati case*¹. The learned Judge has said in para 85 that: (SCC p. 676)

- b "So long as clause (4) stands, an amendment of the Constitution though unconstitutional and void as transgressing the limitation on the amending power of Parliament as laid down in *Kesavananda Bharati case*¹ would be unchallengeable in a court of law. The consequence of this exclusion of the power of judicial review would be that, in effect and substance, the limitation on the amending power of Parliament would, from a practical point of view, become non-existent and it would not be incorrect to say that, covertly and indirectly, by the exclusion of judicial review, the amending power of Parliament would stand enlarged, contrary to the decision of this Court in *Kesavananda Bharati case*¹. This would undoubtedly damage the basic structure of the Constitution, because there are two essential features of the basic structure which would be violated, namely, the limited amending power of Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers."

- c 52. In *Minerva Mills*⁵ while striking down the enlargement of Article 31-C through 42nd Amendment which had replaced the words "of or any of the principles laid down in Part IV" with "the principles specified in clause (b) or clause (c) and Article 39", Chandrachud, J. said: (SCC pp. 592-93, para 1)

- e "Section 4 of the Constitution (Forty-second Amendment) Act is beyond the amending power of Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution."

- f 53. In *Indira Gandhi case*¹¹, for the first time the challenge to the constitutional amendment was not in respect of the rights to property or social welfare, the challenge was with reference to an electoral law. Analysing this decision, H.M. Seervai in *Constitutional Law of India* (4th Edn.) says that "the judgment in *Election case*¹¹ breaks new ground, which has important effects on *Kesavananda Bharati case*¹ itself" (para 30.18). Further the author says that:

"No one can now write on the amending power, without taking into account the effect of *Election case*¹¹." (para 30.19)

h 5 *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

1 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

11 *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

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The author then goes on to clarify the meaning of certain concepts — “constituent power”, “rigid” (controlled), or “flexible” (uncontrolled) constitution, “primary power” and “derivative power”.

54. The distinction is drawn by the author between the making of a Constitution by a Constituent Assembly which was not subject to restraints by any external authority as a plenary law-making power and a power to amend the Constitution, a derivative power derived from the Constitution and subject to the limitations imposed by the Constitution. No provision of the Constitution framed in exercise of plenary law-making power can be ultra vires because there is no touchstone outside the Constitution by which the validity of provision of the Constitution can be adjudged. The power for amendment cannot be equated with such power of framing the Constitution. The amending power has to be within the Constitution and not outside it.

55. For determining whether a particular feature of the Constitution is part of its basic structure, one has per force to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance (Chandrachud, C.J. in *Indira Gandhi case*¹¹).

56. The fundamentalness of fundamental rights has thus to be examined having regard to the enlightened point of view as a result of development of fundamental rights over the years. It is, therefore, imperative to understand the nature of guarantees under fundamental rights as understood in the years that immediately followed after the Constitution was enforced when fundamental rights were viewed by this Court as distinct and separate rights. In early years, the scope of the guarantee provided by these rights was considered to be very narrow. Individuals could only claim limited protection against the State. This position has changed since long. Over the years, the jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power. This transition from a set of independent, narrow rights to broad checks on State power is demonstrated by a series of cases that have been decided by this Court. In *State of Bombay v. Bhanji Munji*²² relying on the ratio of *Gopalan*¹³ it was held that Article 31 was independent of Article 19(1)(f). However, it was in *Rustom Cavasjee Cooper v. Union of India*²³ (popularly known as *Bank Nationalisation case*) that the viewpoint of *Gopalan*¹³ was seriously disapproved. While rendering this decision, the focus of the Court was on the actual impairment caused by the law, rather than the literal validity of the law. This view was reflective of

11 *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

22 AIR 1955 SC 41 : (1955) 1 SCR 777

13 *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 : 1950 SCR 88 : 1950 C6 LJ 1383

23 (1970) 1 SCC 248 : (1970) 3 SCR 530

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I.R. COELHO v. STATE OF TN. (Sabharwal, C.J.)

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a the decision taken in *Sakal Papers (P) Ltd. v. Union of India*²⁴ where the Court was faced with the validity of certain legislative measures regarding the control of newspapers and whether it amounted to infringement of Article 19(1)(a). While examining this question the Court stated that the actual effect of the law on the right guaranteed must be taken into account. This ratio was applied in *Bank Nationalisation case*²³. The Court examined the relation between Article 19(1)(f) and Article 13 and held that they were not mutually exclusive. The ratio of *Gopalan*¹³ was not approved.

b 57. View taken in *Bank Nationalisation case*²³ has been reiterated in number of cases (see *Sambhu Nath Sarkar v. State of W.B.*²⁵, *Haradhan Saha v. State of W.B.*²⁶ and *Khudiram Das v. State of W.B.*²⁷ and finally the landmark judgment in *Maneka Gandhi*¹⁴). Relying upon *Cooper case*²³ it was said that Articles 19(1) and 21 are not mutually exclusive. The Court observed in *Maneka Gandhi case*¹⁴: (SCC pp. 282-83, para 6)

c "The law, must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, insofar as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article. This proposition can no longer be disputed after the decisions in *R.C. Cooper case*²³, *Sambhu Nath Sarkar case*²⁵ and *Haradhan Saha case*²⁶. Now, if a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex hypothesi it must also be liable to be tested with reference to Article 14. This was in fact not disputed by the learned Attorney General and indeed he could not do so in view of the clear and categorical statement made by Mukherjea, J., in *A.K. Gopalan case*¹³ that Article 21 'presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competence of the legislature and the subject it relates to and does not infringe any of the fundamental rights which the Constitution provides for', including Article 14. This Court also applied Article 14 in two of its earlier decisions, namely, *State of W.B. v. Anwar Ali Sarkar*²⁸ and *Kathi Raning Rawat v. State of Saurashtra*²⁹...."

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f (emphasis supplied)

g 24 AIR 1962 SC 305 : (1962) 3 SCR 842

23 *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248 : (1970) 3 SCR 530

13 *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cri LJ 1383

25 (1973) 1 SCC 856 : 1973 SCC (Cri) 618 : (1974) 1 SCR 1

26 (1975) 3 SCC 198 : 1974 SCC (Cri) 816 : (1975) 1 SCR 778

27 (1975) 2 SCC 81 : 1975 SCC (Cri) 435 : (1975) 2 SCR 832

h 14 *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

28 AIR 1952 SC 75 : 1952 SCR 284 : 1952 Cri LJ 510

29 AIR 1952 SC 123 : 1952 SCR 435 : 1952 Cri LJ 805

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58. The decision also stressed on the application of Article 14 to a law under Article 21 and stated that even principles of natural justice be incorporated in such a test. It was held: (SCC pp. 283-84, paras 7 & 8)

"... In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.' Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. *The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.*

Any procedure which permits impairment of the constitutional right to go abroad without giving reasonable opportunity to show cause cannot but be condemned as unfair and unjust and hence, there is in the present case clear infringement of the requirement of Article 21."

(emphasis supplied)

59. The above position was also reiterated by Krishna Iyer, J., as follows: (SCC p. 343, para 96)

"The *Gopalan*¹³ verdict, with the cocooning of Article 22 into a self-contained code, has suffered supersession at the hands of *R.C. Cooper*²³. By way of aside, the fluctuating fortunes of fundamental rights, when the proletariat and the proprietorist have asserted them in Court, partially provoke sociological research and hesitantly project the Cardozo thesis of subconscious forces in judicial noesis when the cycloramic review starts from *Gopalan*¹³, moves on to *Kerala Education Bill, 1957, In re*³⁰ and then on to *All India Bank Employees' Assn.*³¹, next to *Sakal Papers*²⁴, crowning in *Cooper*²³ and followed by *Bennett Coleman*³² and *Sambhu Nath Sarkar*²⁵. Be that as it may, the law is now settled, as I apprehend it, that no article in Part III is an island but part of a continent, and the conspectus of the whole part gives the direction and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man *human*[†] have a synthesis. The

¹³ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cr LJ 1383

²³ *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248 : (1970) 3 SCR 530

³⁰ AIR 1958 SC 956

³¹ *All India Bank Employees' Assn. v. National Industrial Tribunal*, AIR 1962 SC 171

²⁴ *Sakal Papers (P) Ltd. v. Union of India*, AIR 1962 SC 305 : (1962) 3 SCR 842

³² *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788

²⁵ *Sambhu Nath Sarkar v. State of W.B.*, (1973) 1 SCC 856 : 1973 SCC (Cr) 618 : (1974) 1 SCR 1

† Ed.: Emphasis in original.

proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached." (emphasis supplied)

- a 60. It is evident that it can no longer be contended that protection provided by fundamental rights comes in isolated pools. On the contrary, these rights together provide a comprehensive guarantee against excesses by State authorities. Thus post-*Maneka Gandhi case*¹⁴ it is clear that the development of fundamental rights has been such that it no longer involves the interpretation of rights as isolated protections which directly arise but they collectively form a comprehensive test against the arbitrary exercise of State power in any area that occurs as an inevitable consequence. The protection of fundamental rights has, therefore, been considerably widened.

61. The approach in the interpretation of fundamental rights has been evidenced in a recent case *M. Nagaraj v. Union of India*³³ in which the Court noted: (SCC pp. 241-42, para 20)

- c "20. This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part III as a fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the article in which the fundamental value is incorporated. Fundamental right is a limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. In *Sakal Papers (P) Ltd. v. Union of India*²⁴ this Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in *A.K. Gopalan v. State of Madras*¹³. Article 21 of the
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14 *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

33 (2006) 8 SCC 212

24 AIR 1962 SC 305 : (1962) 3 SCR 842

13 *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 : 1950 SCR 88 : 1950 Cri LJ 1383

Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in *A.K. Gopalan*¹³ and held in its landmark judgment in *Maneka Gandhi v. Union of India*¹⁴ that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right. The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part III on the principle that certain unarticulated rights are implicit in the enumerated guarantees." (emphasis supplied)

62. The abrogation or abridgment of the fundamental rights under Chapter III have, therefore, to be examined on broad interpretation, the narrow interpretation of fundamental rights chapter is a thing of past. Interpretation of the Constitution has to be such as to enable the citizens to enjoy the rights guaranteed by Part III in the fullest measure.

Separation of powers

63. The separation of powers between Legislature, Executive and the Judiciary constitutes basic structure, has been found in *Kesavananda Bharati case*¹ by the majority. Later, it was reiterated in *Indira Gandhi case*¹¹. A large number of judgments have reiterated that the separation of powers is one of the basic features of the Constitution.

64. In fact, it was settled centuries ago that for preservation of liberty and prevention of tyranny it is absolutely essential to vest separate powers in three different organs. In *The Federalist* Nos. 47, 48, and 51, James Madison details how a separation of powers preserves liberty and prevents tyranny. In *The Federalist* No. 47, Madison discusses Montesquieu's treatment of the separation of powers in *Spirit of Laws*, (Book XI, Chapter 6). There Montesquieu writes,

"When the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty ... Again, there is no liberty, if the judicial power be not separated from the legislative and executive."

¹³ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 : 1950 SCR 88 : 1950 Ch LJ 1383

¹⁴ (1978) 1 SCC 248

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

¹¹ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

Madison points out that Montesquieu did not feel that different branches could not have overlapping functions, but rather that the power of one department of Government should not be entirely in the hands of another department of Government.

65. Alexander Hamilton in *The Federalist* No. 78, remarks on the importance of the independence of the judiciary to preserve the separation of powers and the rights of the people:

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." (434)

66. Montesquieu finds that tyranny pervades when there is no separation of powers:

"There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

67. The Supreme Court has long held that the separation of powers is part of the basic structure of the Constitution. Even before the basic structure doctrine became part of constitutional law, the importance of the separation of powers on our system of governance was recognised by this Court in *Special Reference No. 1 of 1964*³⁴.

Contentions

68. In the light of aforesaid developments, the main thrust of the argument of the petitioners is that post-1973, it is impermissible to immunise Ninth Schedule laws from judicial review by making Part III inapplicable to such laws. Such a course, it is contended, is incompatible with the doctrine of basic structure. The existence of power to confer absolute immunity is not compatible with the implied limitation upon the power of amendment in Article 368, is the thrust of the contention.

69. Further, relying upon the clarification of Khanna, J., as given in *Indira Gandhi case*¹¹ in respect of his opinion in *Kesavananda Bharati case*¹ it is no longer correct to say that fundamental rights are not included in the basic structure. Therefore, the contention proceeds that since fundamental rights form a part of basic structure thus laws inserted into the Ninth Schedule when tested on the ground of basic structure shall have to be examined on the fundamental rights test.

³⁴ AIR 1965 SC 745 : (1965) 1 SCR 413

¹¹ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

70. The key question, however, is whether the basic structure test would include judicial review of the Ninth Schedule laws on the touchstone of fundamental rights. Thus, it is necessary to examine what exactly is the content of the basic structure test. According to the petitioners, the consequence of the evolution of the principles of basic structure is that the Ninth Schedule laws cannot be conferred with constitutional immunity of the kind created by Article 31-B. Assuming that such immunity can be conferred, its constitutional validity would have to be adjudged by applying the direct impact and effect test which means the form of an amendment is not relevant, its consequence would be determinative factor.

71. The power to make any law at will that transgresses Part III in its entirety would be incompatible with the basic structure of the Constitution. The consequence also is, learned counsel for the petitioners contended, to emasculate Article 32 (which is part of fundamental rights chapter) in its entirety—if the rights themselves (including the principle of rule of law encapsulated in Article 14) are put out of the way, the remedy under Article 32 would be meaningless. In fact, by the exclusion of Part III, Article 32 would stand abrogated qua the Ninth Schedule laws. The contention is that the abrogation of Article 32 would be per se violative of the basic structure. It is also submitted that the constituent power under Article 368 does not include judicial power and that the power to establish judicial remedies which is compatible with the basic structure is qualitatively different from the power to exercise judicial power. The impact is that on the one hand the power under Article 32 is removed and, on the other hand, the said power is exercised by the legislature itself by declaring, in a way, the Ninth Schedule laws as valid.

72. On the other hand, the contention urged on behalf of the respondents is that the validity of the Ninth Schedule legislations can only be tested on the touchstone of basic structure doctrine as decided by the majority in *Kesavananda Bharati case*¹ which also upheld the 29th Constitution Amendment unconditionally and thus there can be no question of judicial review of such legislations on the ground of violation of fundamental rights chapter. The fundamental rights chapter, it is contended, stands excluded as a result of protective umbrella provided by Article 31-B and, therefore, the challenge can only be based on the ground of basic structure doctrine and in addition, legislation can further be tested for (i) lack of legislative competence, and (ii) violation of other constitutional provisions. This would also show, counsel for the respondents argued, that there is no exclusion of judicial review and consequently, there is no violation of the basic structure doctrine.

73. Further, it was contended that the constitutional device for retrospective validation of laws was well known and it is legally permissible to pass laws to remove the basis of the decisions of the Court and consequently, nullify the effect of the decision. It was submitted that Article

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

31-B and the amendments by which legislations are added to the Ninth Schedule form such a device, which "cure the defect" of legislation.

- a 74. The respondents contend that the point in issue is covered by the majority judgment in *Kesavananda Bharati case*¹. According to that view, Article 31-B or the Ninth Schedule is a permissible constitutional device to provide a protective umbrella to the Ninth Schedule laws. The distinction is sought to be drawn between the necessity for the judiciary in a written Constitution and judicial review by the judiciary. Whereas the existence of
- b judiciary is part of the basic framework of the Constitution and cannot be abrogated in exercise of constituent power of Parliament under Article 368, the power of judicial review of the judiciary can be curtailed over certain matters. The contention is that there is no judicial review in absolute terms and Article 31-B only restricts that judicial review power. It is contended that after the doctrine of basic structure which came to be established in
- c *Kesavananda Bharati case*¹ it is only that kind of judicial review whose elimination would destroy or damage the basic structure of the Constitution that is beyond the constituent power. However, in every case where the constituent power excludes judicial review, the basic structure of the Constitution is not abrogated. The question to be asked in each case is, does the particular exclusion alter the basic structure. Giving immunity of Part III
- d to the Ninth Schedule laws from judicial review, does not abrogate judicial review from the Constitution. Judicial review remains with the Court but with its exclusion over the Ninth Schedule laws to which Part III ceases to apply. The effect of placing a law in the Ninth Schedule is that it removes the fetter of Part III by virtue of Article 31-B but that does not oust the court's jurisdiction. It was further contended that Khanna, J. in *Kesavananda Bharati case*¹ held that subject to the retention of the basic structure or framework of
- e the Constitution, the power of amendment is plenary and will include within itself the power to add, alter or repeal various articles including taking away or abridging fundamental rights and that the power to amend the fundamental rights cannot be denied by describing them as natural rights. The contention is that the majority in *Kesavananda Bharati case*¹ held that there is no
- f embargo with regard to amending any of the fundamental rights in Part III subject to the basic structure theory and, therefore, the petitioners are not right in the contention that in the said case the majority held that the fundamental rights form part of the basic structure and cannot be amended. The further contention is that if fundamental rights can be amended, which is the effect of *Kesavananda Bharati case*¹ overruling *Golak Nath case*¹⁰, then
- g fundamental rights cannot be said to be part of the basic structure unless the nature of the amendment is such which destroys the nature and character of the Constitution. It is contended that the test for judicially reviewing the Ninth Schedule laws cannot be on the basis of mere infringement of the rights guaranteed under Part III of the Constitution. The correct test is

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¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

¹⁰ *Golak Nath v. State of Punjab*, AIR 1967 SC 1643 : (1967) 2 SCR 762

whether such laws damage or destroy that part of fundamental rights which form part of the basic structure. Thus, it is contended that judicial review of the Ninth Schedule laws is not completely barred. The only area where such laws get immunity is from the infraction of rights guaranteed under Part III of the Constitution. a

75. To begin with, we find it difficult to accept the broad proposition urged by the petitioners that laws that have been found by the courts to be violative of Part III of the Constitution cannot be protected by placing the same in the Ninth Schedule by use of device of Article 31-B read with Article 368 of the Constitution. In *Kesavananda Bharati case*¹ the majority opinion upheld the validity of the Kerala Act which had been set aside in *Kunjuikutty Sahib v. State of Kerala*³⁵ and the device used was that of the Ninth Schedule. After a law is placed in the Ninth Schedule, its validity has to be tested on the touchstone of basic structure doctrine. In *State of Maharashtra v. Man Singh Straj Singh Padvi*³⁶ a seven-Judge Constitution Bench, post-decision in *Kesavananda Bharati case*¹ upheld the Constitution (Fortieth Amendment) Act, 1976 which was introduced when the appeal was pending in the Supreme Court and thereby included the regulations in the Ninth Schedule. It was held that Article 31-B and the Ninth Schedule cured the defect, if any, in the regulations as regards any unconstitutionality alleged on the ground of infringement of fundamental rights. b c d

76. It is also contended that the power to pack up laws in the Ninth Schedule in absence of any indicia in Article 31-B has been abused and that abuse is likely to continue. It is submitted that the Ninth Schedule which commenced with only 13 enactments has now a list of 284 enactments. The validity of Article 31-B is not in question before us. Further, mere possibility of abuse is not a relevant test to determine the validity of a provision. The people, through the Constitution, have vested the power to make laws in their representatives through Parliament in the same manner in which they have entrusted the responsibility to adjudge, interpret and construe law and the Constitution including its limitation in the judiciary. We, therefore, cannot make any assumption about the alleged abuse of the power. e

Validity of Article 31-B f

77. There was some controversy on the question whether validity of Article 31-B was under challenge or not in *Kesavananda Bharati*¹. On this aspect, Chandrachud, C.J. has say to this in *Waman Rao*⁴: (SCC p. 390, para 32)

"In *Sajjan Singh v. State of Rajasthan*⁹ the Court refused to reconsider the decision in *Sankari Prasad*⁸ with the result that the g

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

³⁵ (1972) 2 SCC 364

³⁶ (1978) 1 SCC 615

⁴ *Waman Rao v. Union of India*, (1981) 2 SCC 362

⁹ *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 : (1965) 1 SCR 933

⁸ *Sankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458 : 1952 SCR 89 h

- a validity of the 1st Amendment remained unshaken. In *Golak Nath*¹⁰, it was held by a majority of 6 : 5 that the power to amend the Constitution was not located in Article 368. The inevitable result of this holding should have been the striking down of all constitutional amendments since, according to the view of the majority, Parliament had no power to amend the Constitution in pursuance of Article 368. But the Court resorted to the doctrine of prospective overruling and held that the constitutional amendments which were already made would be left undisturbed and that its decision will govern the future amendments only.
- b As a result, the 1st Amendment by which Articles 31-A and 31-B were introduced remained inviolate. It is trite knowledge that *Golak Nath*¹⁰ was overruled in *Kesavananda Bharati*¹ in which it was held unanimously that the power to amend the Constitution was to be found in Article 368 of the Constitution. The petitioners produced before us a
- c copy of the civil miscellaneous petition which was filed in *Kesavananda Bharati*¹ by which the reliefs originally asked for were modified. It appears therefrom that what was challenged in that case was the 24th, 25th and the 29th Amendments to the Constitution. The validity of the 1st Amendment was not questioned. Khanna, J., however, held while dealing with the validity of the unamended Article 31-C that the validity
- d of Article 31-A was upheld in *Sankari Prasad*⁸ that its validity could not be any longer questioned because of the principle of stare decisis and that the ground on which the validity of Article 31-A was sustained will be available equally for sustaining the validity of the first part of Article 31-C (p. 744) (SCC p. 812, para 1518)."

- e 78. We have examined various opinions in *Kesavananda Bharati case*¹ but are unable to accept the contention that Article 31-B read with the Ninth Schedule was held to be constitutionally valid in that case. The validity thereof was not in question. The constitutional amendments under challenge in *Kesavananda Bharati case*¹ were examined assuming the constitutional validity of Article 31-B. Its validity was not in issue in that case. Be that as it may, we will assume Article 31-B as valid. The validity of the 1st
- f Amendment inserting in the Constitution, Article 31-B is not in challenge before us.

Point in issue

- g 79. The real crux of the problem is as to the extent and nature of immunity that Article 31-B can validly provide. To decide this intricate issue, it is first necessary to examine in some detail the judgment in *Kesavananda Bharati case*¹ particularly with reference to the 29th Amendment.

***Kesavananda Bharati case*¹**

80. The contention urged on behalf of the respondents that all the Judges, except Sikri, C.J., in *Kesavananda Bharati case*¹ held that the 29th

h 10 *Golak Nath v. State of Punjab*, AIR 1967 SC 1613 : (1967) 2 SCR 762
1 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1
8 *Sankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458 : 1952 SCR 89

Amendment was valid and applied *Jeejeebhoy case*³⁷ is not based on correct ratio of *Kesavananda Bharati case*¹. Six learned Judges (Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud, JJ.) who upheld the validity of 29th Amendment did not subscribe to the basic structure doctrine. The other six learned Judges (Sikri, C.J., Shelat, Grover, Hegde, Mukherjea and Reddy, JJ.) upheld the 29th Amendment subject to it passing the test of basic structure doctrine. The 13th learned Judge (Khanna, J.), though subscribed to basic structure doctrine, upheld the 29th Amendment agreeing with six learned Judges who did not subscribe to the basic structure doctrine. Therefore, it would not be correct to assume that all Judges or Judges in majority on the issue of basic structure doctrine upheld the validity of 29th Amendment unconditionally or were alive to the consequences of basic structure doctrine on 29th Amendment.

81. Six learned Judges otherwise forming the majority, held 29th Amendment valid only if the legislation added to the Ninth Schedule did not violate the basic structure of the Constitution. The remaining six who are in minority in *Kesavananda Bharati case*¹ insofar as it relates to laying down the doctrine of basic structure, held 29th Amendment unconditionally valid.

82. While laying the foundation of basic structure doctrine to test the amending power of the Constitution, Khanna, J. opined that the fundamental rights could be amended, abrogated or abridged so long as the basic structure of the Constitution is not destroyed but at the same time, upheld the 29th Amendment as unconditionally valid. Thus, it cannot be inferred from the conclusion of the seven Judges upholding unconditionally the validity of 29th Amendment that the majority opinion held fundamental rights chapter as not part of the basic structure doctrine. The six Judges who held the 29th Amendment unconditionally valid did not subscribe to the doctrine of basic structure. The other six held 29th Amendment valid subject to it passing the test of basic structure doctrine.

83. Khanna, J. upheld the 29th Amendment in the following terms: (*Kesavananda Bharati case*¹, SCC p. 822, para 1536)

"1536. We may now deal with the Constitution (Twenty-ninth Amendment) Act. This Act, as mentioned earlier, inserted Kerala Act 35 of 1969 and Kerala Act 25 of 1971 as Entries 65 and 66 in the Ninth Schedule to the Constitution. I have been able to find no infirmity in the Constitution (Twenty-ninth Amendment) Act."

84. In his final conclusions, with respect to the Twenty-ninth Amendment, Khanna, J. held as follows: (*Kesavananda Bharati case*¹, SCC p. 825, para 1537)

"1537. (xv) The Constitution (Twenty-ninth Amendment) Act does not suffer from any infirmity and as such is valid."

85. Thus, while upholding the Twenty-ninth Amendment, there was no mention of the test that is to be applied to the legislations inserted in the

³⁷ N.B. *Jeejeebhoy v. Asstt. Collector*, AIR 1965 SC 1096

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

Ninth Schedule. The implication that the respondents seek to draw from the above is that this amounts to an unconditional upholding of the legislations in the Ninth Schedule.

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86. They have also relied on observations by Ray, C.J., as quoted below, in *Indira Gandhi*¹¹. In that case, Ray, C.J. observed: (SCC p. 66, paras 152-53)

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"152. The Constitution (Twenty-ninth Amendment) Act was considered by this Court in *Kesavananda Bharati case*¹. The Twenty-ninth Amendment Act inserted in the Ninth Schedule to the Constitution Entries 65 and 66 being the Kerala Land Reforms Act, 1969 and the Kerala Land Reforms Act, 1971. *This Court unanimously upheld the validity of the Twenty-ninth Amendment Act.* ... The view of seven Judges in *Kesavananda Bharati case*¹ is that Article 31-B is a constitutional device to place the specified statutes in the Schedule beyond any attack that these infringe Part III of the Constitution. *The 29th Amendment is affirmed in Kesavananda Bharati case*¹ by majority of seven against six Judges.

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153. ... Second, the majority view in *Kesavananda Bharati case*¹ is that the 29th Amendment which put the two statutes in the Ninth Schedule and Article 31-B is not open to challenge on the ground of either damage to or destruction of basic features, basic structure or basic framework or on the ground of violation of fundamental rights."

(emphasis supplied)

87. The respondents have particularly relied on the aforesaid highlighted portions.

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88. On the issue of how the 29th Amendment in *Kesavananda Bharati case*¹ was decided, in *Minerva Mills*⁵, Bhagwati, J. has said thus: (SCC p. 685, para 91)

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"The validity of the Twenty-ninth Amendment Act was challenged in *Kesavananda Bharati case*¹, but by a majority consisting of Khanna, J. and the six learned Judges led by Ray, J. (as he then was), it was held to be valid. Since all the earlier constitutional amendments were held valid on the basis of unlimited amending power of Parliament recognised in *Sankari Prasad case*⁸ and *Sajjan Singh case*⁹ and were accepted as valid in *Golak Nath case*¹⁰ and the Twenty-ninth Amendment Act was also held valid in *Kesavananda Bharati case*¹, though not on the application of the basic structure test, and these constitutional amendments have been recognised as valid over a number of years and moreover, the statutes intended to be protected by them are all falling within Article 31-

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11 *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

1 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

5 *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

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8 *Sankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458 : 1952 SCR 89

9 *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845 : (1965) 1 SCR 933

10 *Golak Nath v. State of Punjab*, AIR 1967 SC 1643 : (1967) 2 SCR 762

A with the possible exception of only four Acts referred to above, I do not think, we would be justified in reopening the question of validity of these constitutional amendments and hence we hold them to be valid. But, all constitutional amendments made after the decision in *Kesavananda Bharati case*¹ would have to be tested by reference to the basic structure doctrine, for Parliament would then have no excuse for saying that it did not know the limitation on its amending power.” a

89. To us, it seems that the position is correctly reflected in the aforesaid observations of Bhagwati, J. and with respect we feel that Ray, C.J. is not correct in the conclusion that the 29th Amendment was unanimously upheld. Since the majority which propounded the basic structure doctrine did not unconditionally uphold the validity of the 29th Amendment and six learned Judges forming the majority left that to be decided by a smaller Bench and upheld its validity subject to it passing basic structure doctrine, the factum of validity of the 29th Amendment in *Kesavananda Bharati case*¹ is not conclusive of matters under consideration before us. b c

90. In order to understand the view of Khanna, J. in *Kesavananda Bharati*¹, it is important to take into account his later clarification. In *Indira Gandhi*¹¹ Khanna, J. made it clear that he never opined that fundamental rights were outside the purview of basic structure and observed as follows: d

“251. There was a controversy during the course of arguments on the point as to whether I have laid down in my judgment in *Kesavananda Bharati case*¹ that fundamental rights are not a part of the basic structure of the Constitution. As this controversy cropped up a number of times, it seems apposite that before I conclude I should deal with the contention advanced by learned Solicitor General that according to my judgment in that case no fundamental right is part of the basic structure of the Constitution. I find it difficult to read anything in that judgment to justify such a conclusion. What has been laid down in that judgment is that no article of the Constitution is immune from the amendatory process because of the fact that it relates to a fundamental right and is contained in Part III of the Constitution. ... e f

252. ... The above observations clearly militate against the contention that according to my judgment fundamental rights are not a part of the basic structure of the Constitution. I also dealt with the matter at length to show that the right to property was not a part of the basic structure of the Constitution. This would have been wholly unnecessary if none of the fundamental rights was a part of the basic structure of the Constitution.” g

91. Thus, after his aforesaid clarification, it is not possible to read the decision of Khanna, J. in *Kesavananda Bharati*¹ so as to exclude fundamental rights from the purview of the basic structure. The import of this h

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCIR 1

¹¹ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

- observation is significant in the light of the amendment that he earlier upheld. It is true that if the fundamental rights were never a part of the basic structure, it would be consistent with an unconditional upholding of the
- a Twenty-ninth Amendment, since its impact on the fundamental rights guarantee would be rendered irrelevant. However, having held that some of the fundamental rights *are* a part of the basic structure, any amendment having an impact on fundamental rights would necessarily have to be examined in that light. Thus, the fact that Khanna, J. held that some of the
- b fundamental rights were a part of the basic structure has a significant impact on his decision regarding the Twenty-ninth Amendment and the validity of the Twenty-ninth Amendment must necessarily be viewed in that light. His clarification demonstrates that he was not of the opinion that all the fundamental rights were not part of the basic structure and the inevitable conclusion is that the Twenty-ninth Amendment, even if treated as
- c unconditionally valid, is of no consequence on the point in issue in view of peculiar position as to majority abovenoted.

92. Such an analysis is supported by Seervai, in his book *Constitutional Law of India* (4th Edn., Vol. III), as follows: (para 30.65, pp. 3150-51)

- "Although in his judgment in *Election case*¹¹, Khanna, J. clarified his judgment in *Kesavananda case*¹, that clarification raised a serious
- d problem of its own. The problem was: in view of the clarification, was Khanna, J. right in holding that Article 31-B and Schedule IX were unconditionally valid? Could he do so after he had held that the basic structure of the Constitution could not be amended? As we have seen, that problem was solved in *Minerva Mills case*⁵ by holding that Acts inserted in Schedule IX after 25-4-1973 were not unconditionally valid,
- e but would have to stand the test of fundamental rights. (para 30.48, p. 3138)

* * *

- But while the clarification in *Election case*¹¹ simplifies one problem—the scope of the amending power—it raises complicated problems of its own. Was Khanna, J. right in holding Article 31-B (and
- f Schedule IX) unconditionally valid by holding the 29th Amendment unconditionally valid? And was he right when he held the substantive part of Article 31-C unconditionally valid? An answer to these questions requires an analysis of the function of Article 31-B and Schedule IX Taking Article 31-B and Schedule IX first, their effect is to confer
- g validity on laws already enacted which would be void for violating one or more of the fundamental rights conferred by Part III (fundamental rights). ... But if the power of amendment is limited by the doctrine of the basic structure, a grave problem immediately arises. ... The thing to note is that though such Acts do not become a part of the Constitution, by

h ¹¹ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

⁵ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

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being included in Schedule IX* *they owe their validity to the exercise of the amending power. Can Acts, which destroy the secular character of the State, be given validity and be permitted to destroy a part of the basic structure as a result of the exercise of the amending power?* That, in the last analysis, is the real problem; and it is submitted that if the doctrine of the basic structure is accepted, there can be only one answer. If Parliament, exercising constituent power cannot enact an amendment destroying the secular character of the State, neither can Parliament, exercising its constituent power, permit Parliament or the State Legislatures to produce the same result by protecting laws, enacted in the exercise of legislative power, which produce the same result. To hold otherwise would be to abandon the doctrine of the basic structure in respect of fundamental rights, for every part of that basic structure can be destroyed by first enacting laws which produce that effect, and then protecting them by inclusion in Schedule IX. Such a result is consistent with the view that fundamental rights are not part of the basic structure; it is wholly inconsistent with the view that some fundamental rights are a part of the basic structure, as Khanna, J. said in his clarification. ... In other words, the validity of the 25th and 29th Amendments raised the question of applying the law laid down as to the scope of the amending power when determining the validity of the 24th Amendment. If that law was correctly laid down, it did not become incorrect by being wrongly applied. Therefore the conflict between Khanna, J.'s views on the amending power and on the unconditional validity of the 29th Amendment is resolved by saying that he laid down the scope of the amending power correctly but misapplied that law in holding Article 31-B and Schedule IX unconditionally valid Consistently with his view that some fundamental rights were part of the basic structure, he ought to have joined the 6 other Judges in holding that the 29th Amendment was valid, but the Acts included in Schedule IX would have to be scrutinised by the Constitution Bench to see whether they destroyed or damaged any part of the basic structure of the Constitution, and if they did, such laws would not be protected." (portion in italics is emphasis in original, portion underlined is emphasis supplied herein)

93. The decision in *Kesavananda Bharati*¹ regarding the Twenty-ninth Amendment is restricted to that particular amendment and no principle flows therefrom.

94. We are unable to accept the contention urged on behalf of the respondents that in *Waman Rao case*⁴ Chandrachud, J., and in *Minerva Mills case*⁵ Bhagwati, J. have not considered the binding effect of majority

* [Footnote at p. 3150] This is clear from the provision of Article 31-B that such laws are subject to the power of any competent legislature to repeal or amend them—and no State Legislature has the power to repeal or amend the Constitution, nor has Parliament such power outside Article 368, except where such power is conferred by a few articles.

1 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

4 *Waman Rao v. Union of India*, (1981) 2 SCC 362

5 *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

judgments in *Kesavananda Bharati case*¹. In these decisions, the development of law post-*Kesavananda Bharati case*¹ has been considered.

- a The conclusion has rightly been reached, also having regard to the decision in *Indira Gandhi case*¹¹ that post-*Kesavananda Bharati case*¹ or after 24-4-1973, the Ninth Schedule laws will not have the full protection. The doctrine of basic structure was involved in *Kesavananda Bharati case*¹ but its effect, impact and working was examined in *Indira Gandhi case*¹¹, *Waman Rao case*⁴ and *Minerva Mills case*⁵. To say that these judgments have not considered the binding effect of the majority judgment in *Kesavananda Bharati case*¹ is not based on a correct reading of *Kesavananda Bharati*¹.
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95. On the issue of equality, we do not find any contradiction or inconsistency in the views expressed by Chandrachud, J. in *Indira Gandhi case*¹¹, by Krishna Iyer, J. in *Bhim Singh case*⁶ and Bhagwati, J. in *Minerva Mills case*⁵. All these judgments show that violation in individual case has to be examined to find out whether violation of equality amounts to destruction of the basic structure of the Constitution.

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96. Next, we examine the extent of immunity that is provided by Article 31-B. The principle that constitutional amendments which violate the basic structure doctrine are liable to be struck down will also apply to amendments made to add laws in the Ninth Schedule is the view expressed by Sikri, C.J.
- d Substantially similar separate opinions were expressed by Shelai, Grover, Hegde, Mukherjea and Reddy, JJ. In the four different opinions six learned Judges came substantially to the same conclusion. These Judges read an implied limitation on the power of Parliament to amend the Constitution. Khanna, J. also opined that there was implied limitation in the shape of the basic structure doctrine that limits the power of Parliament to amend the
- e Constitution but the learned Judge upheld the 29th Amendment and did not say, like the remaining six Judges, that the Twenty-ninth Amendment will have to be examined by a smaller Constitution Bench to find out whether the said amendment violated the basic structure theory or not. This gave rise to the argument that fundamental rights chapter is not part of basic structure. Khanna, J. however, does not so say in *Kesavananda Bharati case*¹.
- f Therefore, *Kesavananda Bharati case*¹ cannot be said to have held that fundamental rights chapter is not part of basic structure. Khanna, J. while considering the Twenty-ninth Amendment, had obviously in view the laws that had been placed in the Ninth Schedule by the said amendment related to the agrarian reforms. Khanna, J. did not want to elevate the right to property under Article 19(1)(f) to the level and status of basic structure or basic framework of the Constitution, that explains the ratio of *Kesavananda Bharati case*¹. Further, doubt, if any, as to the opinion of Khanna, J. stood resolved on the clarification given in *Indira Gandhi case*¹¹ by the learned
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1 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

11 *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

4 *Waman Rao v. Union of India*, (1981) 2 SCC 362

5 *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

6 *Bhim Singhji v. Union of India*, (1981) 1 SCC 166

Judge that in *Kesavananda Bharati case*¹ he never held that fundamental rights are not a part of the basic structure or framework of the Constitution.

97. The rights and freedoms created by the fundamental rights chapter can be taken away or destroyed by amendment of the relevant article, but subject to limitation of the doctrine of basic structure. True, it may reduce the efficacy of Article 31-B but that is inevitable in view of the progress the laws have made post-*Kesavananda Bharati case*¹ which has limited the power of Parliament to amend the Constitution under Article 368 of the Constitution by making it subject to the doctrine of basic structure.

98. To decide the correctness of the rival submissions, the first aspect to be borne in mind is that each exercise of the amending power inserting laws into the Ninth Schedule entails a complete removal of the fundamental rights chapter vis-à-vis the laws that are added in the Ninth Schedule. Secondly, insertion in the Ninth Schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated. The consequence of insertion is that it nullifies entire Part III of the Constitution. There is no constitutional control on such nullification. It means an unlimited power to totally nullify Part III insofar as the Ninth Schedule legislations are concerned. The supremacy of the Constitution mandates all constitutional bodies to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative acts through an independent organ viz. the judiciary.

99. While examining the validity of Article 31-C in *Kesavananda Bharati case*¹ it was held that the vesting of power of the exclusion of judicial review in a legislature including a State Legislature, strikes at the basic structure of the Constitution. It is on this ground that second part of Article 31-C was held to be beyond the permissible limits of power of amendment of the Constitution under Article 368.

100. If the doctrine of basic structure provides a touchstone to test the amending power or its exercise, there can be no doubt and it has to be so accepted that Part III of the Constitution has a key role to play in the application of the said doctrine.

101. Regarding the status and stature in respect of fundamental rights in constitutional scheme, it is to be remembered that fundamental rights are those rights of citizens or those negative obligations of the State which do not permit encroachment on individual liberties. The State is to deny no one equality before the law. The object of the fundamental rights is to foster the social revolution by creating a society egalitarian to the extent that all citizens are to be equally free from coercion or restriction by the State. By enacting fundamental rights and directive principles which are negative and positive obligations of the States, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental rights and directive principles have to be balanced. That balance can be tilted in favour of the public good. The balance, however, cannot be overturned by completely overriding individual liberty. This balance is an essential feature of the Constitution.

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

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102. Fundamental rights enshrined in Part III were added to the Constitution as a check on the State power, particularly the legislative power.

- a Through Article 13, it is provided that the State cannot make any laws that are contrary to Part III. The framers of the Constitution have built a wall around certain parts of fundamental rights, which have to remain forever, limiting ability of majority to intrude upon them. That wall is the "basic structure" doctrine. Under Article 32, which is also part of Part III, the Supreme Court has been vested with the power to ensure compliance with Part III. The responsibility to judge the constitutionality of all laws is that of judiciary. Thus, when power under Article 31-B is exercised, the legislations made completely immune from Part III results in a direct way out of the check of Part III, including that of Article 32. It cannot be said that the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution. In *Waman Rao case*¹ while discussing the application of basic structure doctrine to the first amendment, it was observed that the measure of the permissibility of an amendment of a pleading is how far it is consistent with the original; you cannot by an amendment transform the original into opposite of what it is. For that purpose, a comparison is undertaken to match the amendment with the original. Such a comparison can yield fruitful results even in the rarefied sphere of constitutional law.
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103. Indeed, if Article 31-B only provided restricted immunity and it seems that original intent was only to protect a limited number of laws, it would have been only exception to Part III and the basis for the initial upholding of the provision. However, the unchecked and rampant exercise of this power, the number having gone from 13 to 284, shows that it is no longer a mere exception. The absence of guidelines for exercise of such power means the absence of constitutional control which results in destruction of constitutional supremacy and creation of parliamentary hegemony and absence of full power of judicial review to determine the constitutional validity of such exercise.

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- f 104. It is also contended for the respondents that Article 31-A excludes judicial review of certain laws from the applications of Articles 14 and 19 and that Article 31-A has been held to be not violative of the basic structure. The contention, therefore, is that exclusion of judicial review would not make the Ninth Schedule law invalid. We are not holding such law per se invalid but, examining the extent of the power which the legislature will come to possess, Article 31-A does not exclude uncatalogued number of laws from challenge on the basis of Part III. It provides for a standard by which laws stand excluded from judicial review. Likewise, Article 31-C applies as a yardstick the criteria of sub-clauses (b) and (c) of Article 39 which refers to equitable distribution of resources.
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- h 105. The fundamental rights have always enjoyed a special and privileged place in the Constitution. Economic growth and social equity are the two pillars of our Constitution which are linked to the rights of an individual (right to equal opportunity), rather than in the abstract. Some of

¹ *Waman Rao v. Union of India*, (1981) 2 SCC 362

the rights in Part III constitute fundamentals of the Constitution like Article 21 read with Articles 14 and 15 which represent secularism, etc. As held in *Nagaraj*³³ egalitarian equality exists in Article 14 read with Articles 16(4), (4-A), (4-B) and, therefore, it is wrong to suggest that equity and justice finds place only in the directive principles. a

106. Parliament has power to amend the provisions of Part III so as to abridge or take away fundamental rights, but that power is subject to the limitation of basic structure doctrine. Whether the impact of such amendment results in violation of basic structure has to be examined with reference to each individual case. Take the example of freedom of press which, though not separately and specifically guaranteed, has been read as part of Article 19(1)(a). If Article 19(1)(a) is sought to be amended so as to abrogate such right (which we hope will never be done), the acceptance of the respondent's contention would mean that such amendment would fall outside the judicial scrutiny when the law curtailing these rights is placed in the Ninth Schedule as a result of immunity granted by Article 31-B. The impact of such an amendment shall have to be tested on the touchstone of rights and freedoms guaranteed by Part III of the Constitution. In a given case, even abridgement may destroy the real freedom of the press and, thus, be destructive of the basic structure. Take another example. The secular character of our Constitution is a matter of conclusion to be drawn from various articles conferring fundamental rights; and if the secular character is not to be found in Part III, it cannot be found anywhere else in the Constitution because every fundamental right in Part III stands either for a principle or a matter of detail. Therefore, one has to take a synoptic view of the various articles in Part III while judging the impact of the laws incorporated in the Ninth Schedule on the articles in Part III. It is not necessary to multiply the illustrations. b

107. After enunciation of the basic structure doctrine, full judicial review is an integral part of the constitutional scheme. Khanna, J. in *Kesavananda Bharati case*¹ was considering the right to property and it is in that context it was said that no article of the Constitution is immune from the amendatory process. We may recall what Khanna, J. said while dealing with the words "amendment of the Constitution". His Lordship said that these words with all the wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. The opinion of Khanna, J. in *Indira Gandhi*¹¹ clearly indicates that the view in *Kesavananda Bharati case*¹ is that at least some fundamental rights do form part of the basic structure of the Constitution. Detailed discussion in *Kesavananda Bharati case*¹ to demonstrate that the right to property was not part of the basic structure of the Constitution by itself shows that some of the fundamental rights are part of the basic structure of the Constitution. The placement of a right in the scheme of the Constitution, the impact of the offending law on that right, the effect of the exclusion of that right from judicial review, the abrogation of the principle or the essence of that right is c

³³ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

¹¹ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

an exercise which cannot be denied on the basis of fictional immunity under Article 31-B.

- a 108. In *Indira Gandhi case*¹¹ Chandrachud, J. posits that equality embodied in Article 14 is part of the basic structure of the Constitution and, therefore, cannot be abrogated by observing that the provisions impugned in that case are an outright negation of the right of equality conferred by Article 14, a right which more than any other is a basic postulate of our Constitution.
- b 109. Dealing with Articles 14, 19 and 21 in *Minerva Mills case*⁵ it was said that these clearly form part of the basic structure of the Constitution and cannot be abrogated. It was observed that three articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. These articles stand on altogether different footing. Can it be said, after the evolution of the basic structure doctrine, that exclusion of these rights at Parliament's will without any standard, cannot be subjected to judicial scrutiny as a result of the bar created by Article 31-B? The obvious answer has to be in the negative. If some of the fundamental rights constitute a basic structure, it would not be open to immunise those legislations from full judicial scrutiny either on the ground that the fundamental rights are not part of the basic structure or on the ground that Part III provisions are not available as a result of immunity granted by Article 31-B. It cannot be held
- c that essence of the principle behind Article 14 is not part of the basic structure. In fact, essence or principle of the right or nature of violation is more important than the equality in the abstract or formal sense. The majority opinion in *Kesavananda Bharati case*¹ clearly is that the principles behind fundamental rights are part of the basic structure of the Constitution. It is necessary to always bear in mind that fundamental rights have been considered to be heart and soul of the Constitution. Rather these rights have been further defined and redefined through various trials having regard to various experiences and some attempts to invade and nullify these rights. The fundamental rights are deeply interconnected. Each supports and strengthens the work of the others. The Constitution is a living document, its interpretation may change as the time and circumstances change to keep pace with it. This is the ratio of the decision in *Indira Gandhi case*¹¹.
- d 110. The history of the emergence of modern democracy has also been the history of securing basic rights for the people of other nations also. In the United States the Constitution was finally ratified only upon an understanding that a Bill of Rights would be immediately added guaranteeing certain basic freedoms to its citizens. At about the same time when the Bill of Rights was being ratified in America, the French Revolution declared the Rights of Man to Europe. When the death of colonialism and the end of World War II birthed new nations across the globe, these States embraced rights as foundations to their new Constitutions. Similarly, the rapid increase in the creation of Constitutions that coincided with the end of the Cold War has planted rights at the base of these documents.
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¹¹ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

⁵ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 1 SCC 225 : 1973 Supp SCR 1

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111. Even countries that have long respected and upheld rights, but whose governance traditions did not include their constitutional affirmation have recently felt they could no longer leave their deep commitment to rights, left unstated. In 1998, the United Kingdom adopted the Human Rights Act which gave explicit effect to the European Convention on Human Rights. In Canada, "the Constitution Act of 1982" enshrined certain basic rights into their system of governance. Certain fundamental rights, and the principles that underlie them, are foundational not only to the Indian democracy, but democracies around the world. Throughout the world nations have declared that certain provisions or principles in their constitutions are inviolable.

112. Our Constitution will almost certainly continue to be amended as India grows and changes. However, a democratic India will not grow out of the need for protecting the principles behind our fundamental rights.

113. Other countries having controlled constitutions, like Germany, have embraced the idea that there is a basic structure to their constitutions and in doing so have entrenched various rights as core constitutional commitments. India's constitutional history has led us to include the essence of each of our fundamental rights in the basic structure of our Constitution.

114. The result of the aforesaid discussion is that since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles. If the law infringes the essence of any of the fundamental rights or any other aspect of the basic structure then it will be struck down. The extent of abrogation and limit of abridgment shall have to be examined in each case.

115. We may also recall the observations made in *Special Reference No. 1 of 1964*³⁴ as follows: (AIR p. 763, para 42)

"[W]hether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not. Just as the legislatures are conferred legislative authority and their functions are normally confined to legislative functions, and the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the judicature of this country;"

(emphasis supplied)

34 AIR 1965 SC 745 : (1965) 1 SCR 413

- a 116. We are of the view that while laws may be added to the Ninth Schedule, once Article 32 is triggered, these legislations must answer to the complete test of fundamental rights. Every insertion into the Ninth Schedule does not restrict Part III review, it completely excludes Part III at will. For this reason, every addition to the Ninth Schedule triggers Article 32 as part of the basic structure and is consequently subject to the review of the fundamental rights as they stand in Part III.

b *Extent of judicial review in the context of amendments to the Ninth Schedule*

- c 117. We are considering the question as to the extent of judicial review permissible in respect of the Ninth Schedule laws in the light of the basic structure theory propounded in *Kesavananda Bharati case*¹. In this connection, it is necessary to examine the nature of the constituent power exercised in amending a Constitution.

- d 118. We have earlier noted that the power to amend cannot be equated with the power to frame the Constitution. This power has no limitations or constraints, it is primary power, a real plenary power. The latter (*sic* former) power, however, is derived from the former (*sic* latter). It has constraints of the document viz. Constitution which creates it. This derivative power can be exercised within the four corners of what has been conferred on the body constituted, namely, Parliament. The question before us is not about power to amend Part III after 24-4-1973. As per *Kesavananda Bharati*¹ power to amend exists in Parliament but it is subject to the limitation of doctrine of basic structure. The fact of validation of laws based on exercise of blanket immunity eliminates Part III in entirety hence the "rights test" as part of the basic structure doctrine has to apply.

- e 119. In *Kesavananda Bharati case*¹ the majority held that the power of amendment of the Constitution under Article 368 did not enable Parliament to alter the basic structure of the Constitution.

- f 120. *Kesavananda Bharati case*¹ laid down a principle as an axiom which was examined and worked out in *Indira Gandhi case*¹¹, *Minerva Mills*⁵, *Waman Rao*⁴ and *Bhim Singhji*⁶.

- g 121. As already stated, in *Indira Gandhi case*¹¹ for the first time, the constitutional amendment that was challenged did not relate to property right but related to free and fair election. As is evident from what is stated above that the power of amending the Constitution is a species of law-making power which is the genus. It is a different kind of law-making power conferred by the Constitution. It is different from the power to frame the Constitution i.e. a plenary law-making power as described by Seervai in *Constitutional Law of India* (4th Edn.).

1 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

11 *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

h 5 *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

4 *Waman Rao v. Union of India*, (1981) 2 SCC 362

6 *Bhim Singhji v. Union of India*, (1981) 1 SCC 166

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122. The scope and content of the words "constituent power" expressly stated in the amended Article 368 came up for consideration in *Indira Gandhi case*¹¹. Article 329-A(4) was struck down because it crossed the implied limitation of amending power, that it made the controlled Constitution uncontrolled, that it removed all limitations on the power to amend and that it sought to eliminate the golden triangle of Article 21 read with Articles 14 and 19. (See also *Minerva Mills case*⁵.)

123. It is *Kesavananda Bharati case*¹ read with clarification of Khanna, J. in *Indira Gandhi case*¹¹ which takes us one step forward, namely, that fundamental rights are interconnected and some of them form part of the basic structure as reflected in Article 15, Article 21 read with Article 14, Article 14 read with Articles 16(4), (4-A), (4-B), etc. *Bharati*¹ and *Indira Gandhi*¹¹ cases have to be read together and if so read the position in law is that the basic structure as reflected in the above articles provide a test to judge the validity of the amendment by which laws are included in the Ninth Schedule.

124. Since power to amend the Constitution is not unlimited, if changes brought about by amendments destroy the identity of the Constitution, such amendments would be void. That is why when entire Part III is sought to be taken away by a constitutional amendment by the exercise of constituent power under Article 368 by adding the legislation in the Ninth Schedule, the question arises as to the extent of judicial scrutiny available to determine whether it alters the fundamentals of the Constitution. Secularism is one such fundamental, equality is the other, to give a few examples to illustrate the point. It would show that it is impermissible to destroy Articles 14 and 15 or abrogate or en bloc eliminate these fundamental rights. To further illustrate the point, it may be noted that Parliament can make additions in the three legislative lists, but cannot abrogate all the lists as it would abrogate the federal structure.

125. The question can be looked at from yet another angle also. Can Parliament increase the amending power by amendment of Article 368 to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The answer is obvious. Article 368 does not vest such a power in Parliament. It cannot lift all restrictions placed on the amending power or free the amending power from all its restrictions. This is the effect of the decision in *Kesavananda Bharati case*¹ as a result of which secularism, separation of power, equality, etc., to cite a few examples, would fall beyond the constituent power in the sense that the constituent power cannot abrogate these fundamentals of the Constitution. Without equality the rule of law, secularism, etc. would fail. That is why Khanna, J. held that some of the fundamental rights like Article 15 form part of the basic structure.

126. If constituent power under Article 368, the other name for amending power, cannot be made unlimited, it follows that Article 31-B cannot be so

11 *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

5 *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

1 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

a used as to confer unlimited power. Article 31-B cannot go beyond the limited amending power contained in Article 368. The power to amend Ninth Schedule flows from Article 368. This power of amendment has to be compatible with the limits on the power of amendment. This limit came with *Kesavananda Bharati case*¹. Therefore Article 31-B after 24-4-1973 despite its wide language cannot confer unlimited or unregulated immunity.

b 127. To legislatively override entire Part III of the Constitution by invoking Article 31-B would not only make the fundamental rights overridden by directive principles but it would also defeat fundamentals such as secularism, separation of powers, equality and also the judicial review which are the basic features of the Constitution and essential elements of rule of law and that too without any yardstick/standard being provided under Article 31-B.

c 128. Further, it would be incorrect to assume that social content exists only in directive principles and not in the fundamental rights. Articles 15 and 16 are facets of Article 14. Article 16(1) concerns formal equality which is the basis of the rule of law. At the same time, Article 16(4) refers to egalitarian equality. Similarly, the general right of equality under Article 14 has to be balanced with Article 15(4) when excessiveness is detected in grant of protective discrimination. Article 15(1) limits the rights of the State by providing that there shall be no discrimination on the grounds only of religion, race, caste, sex, etc. and yet it permits classification for certain classes, hence social content exists in fundamental rights as well. All these are relevant considerations to test the validity of the Ninth Schedule laws.

e 129. Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.

f 130. Realising that it is necessary to secure the enforcement of the fundamental rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts. Judicial review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. It may be noted that the mere fact that equality, which is a part of the basic structure, can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether any particular feature of the Constitution is part of the basic structure—rule of law, separation of powers—the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of the basic structure.

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¹ *Kesavananda Bharati v. State of Kerala*, (1973) 1 SCC 225

131. On behalf of the respondents, reliance has been placed on the decision of a nine-Judge Constitution Bench in *Attorney General for India v. Amratlal Prajivandas*³⁸ to submit that argument of a violation of Article 14 being equally violative of basic structure or Articles 19 and 21 representing the basic structure of the Constitution has been rejected. Para 20 referred to by learned counsel for the respondent reads as under: (SCC p. 71)

"20. Before entering upon discussion of the issues arising herein, it is necessary to make a few clarificatory observations. Though a challenge to the constitutional validity of 39th, 40th and 42nd Amendments to the Constitution was levelled in the writ petitions on the ground that the said amendments—effected after the decision in *Kesavananda Bharati v. State of Kerala*¹—infringe the basic structure of the Constitution, no serious attempt was made during the course of arguments to substantiate it. It was generally argued that Article 14 is one of the basic features of the Constitution and hence any constitutional amendment violative of Article 14 is equally violative of the basic structure. This simplistic argument overlooks the *raison d'être* of Article 31-B—at any rate, its continuance and relevance after *Bharati*¹—and of the 39th and 40th Amendments placing the said enactments in the Ninth Schedule. Acceptance of the petitioners' argument would mean that in case of post-*Bharati* constitutional amendments placing Acts in the Ninth Schedule, the protection of Article 31-B would not be available against Article 14. Indeed, it was suggested that Articles 21 and 19 also represent the basic features of the Constitution. If so, it would mean a further enervation of Article 31-B. Be that as it may, in the absence of any effort to substantiate the said challenge, we do not wish to express any opinion on the constitutional validity of the said amendments. We take them as they are i.e. we assume them to be good and valid. We must also say that no effort has also been made by the counsel to establish in what manner the said Amendment Acts violate Article 14."

132. It is evident from the aforementioned passage that the question of violation of Articles 14, 19 or 21 was not gone into. The Bench did not express any opinion on those issues. No attempt was made to establish violation of these provisions. In para 56, while summarising the conclusion, the Bench did not express any opinion on the validity of the Thirty-ninth and Fortieth Amendment Acts to the Constitution of India placing COFEPOSA and SAFEMA in the Ninth Schedule. These Acts were assumed to be good and valid. No arguments were also addressed with respect to the validity of the Forty-second Amendment Act.

133. Every amendment to the Constitution whether it be in the form of amendment of any article or amendment by insertion of an Act in the Ninth Schedule, has to be tested by reference to the doctrine of basic structure which includes reference to Article 21 read with Article 14, Article 15, etc. As stated, laws included in the Ninth Schedule do not become part of the Constitution, they derive their validity on account of the exercise undertaken

38 (1994) 5 SCC 51 : 1994 SCC (Cri) 1325

1 (1973) 4 SCC 225 : 1973 Supp SCR 1

a by Parliament to include them in the Ninth Schedule. That exercise has to be tested every time it is undertaken. In respect of that exercise the principle of compatibility will come in. One has to see the effect of the impugned law on one hand and the exclusion of Part III in its entirety at the will of Parliament.

134. In *Waman Rao*⁴ it was accordingly rightly held that the Acts inserted in the Ninth Schedule after 24-4-1973 would not receive the full protection.

Exclusion of judicial review if compatible with the doctrine of basic structure—concept of judicial review

b 135. Judicial review is justified by combination of "the principle of separation of powers, rule of law, the principle of constitutionality and the reach of judicial review" (*Democracy Through Law* by Lord Styen, p. 131).

c 136. The role of the judiciary is to protect fundamental rights. A modern democracy is based on the twin principles of majority rule and the need to protect fundamental rights. According to Lord Styen, it is job of the judiciary to balance the principles ensuring that the Government on the basis of number does not override fundamental rights.

Application of doctrine of basic structure

d 137. In *Kesavananda Bharati case*¹ the discussion was on the amending power conferred by unamended Article 368 which did not use the words "constituent power". We have already noted the difference between original power of framing the Constitution known as constituent power and the nature of constituent power vested in Parliament under Article 368. By addition of the words "constituent power" in Article 368, the amending body, namely, Parliament does not become the original Constituent Assembly. It remains a Parliament under a controlled Constitution. Even after the words "constituent power" are inserted in Article 368, the limitations of doctrine of basic structure would continue to apply to Parliament. It is on this premise that clauses (4) and (5) inserted in Article 368 by the 42nd Amendment were struck down in *Minerva Mills case*⁵.

f 138. The relevance of *Indira Gandhi case*¹¹, *Minerva Mills case*⁵ and *Waman Rao case*⁴ lies in the fact that every improper enhancement of its own power by Parliament, be it clause (4) of Article 329-A or clauses (4) and (5) of Article 368 or Section 4 of the 42nd Amendment has been held to be incompatible with the doctrine of basic structure as they introduced new elements which altered the identity of the Constitution or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded. They obliterated important elements like judicial review. They made directive principles en bloc a touchstone for obliteration of all the fundamental rights and provided for insertion of laws in the Ninth Schedule which had no nexus with agrarian reforms. It is in this context that we have to examine the power of immunity bearing in mind that after *Kesavananda Bharati case*¹ Article 368 is subject to implied limitation of basic structure.

4 *Waman Rao v. Union of India*, (1981) 2 SCC 362

h 1 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

5 *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

11 *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

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139. The question examined in *Waman Rao case*⁴ was whether the device of Article 31-B could be used to immunise the Ninth Schedule laws from judicial review by making the entire Part III inapplicable to such laws and whether such a power was incompatible with basic structure doctrine. The answer was in the affirmative. It has been said that it is likely to make the controlled Constitution uncontrolled. It would render the doctrine of basic structure redundant. It would remove the golden triangle of Article 21 read with Article 14 and Article 19 in its entirety for examining the validity of the Ninth Schedule laws as it makes the entire Part III inapplicable at the will of Parliament. This results in the change of the identity of the Constitution which brings about incompatibility not only with the doctrine of basic structure but also with the very existence of limited power of amending the Constitution. The extent of judicial review is to be examined having regard to these factors. a

140. The object behind Article 31-B is to remove difficulties and not to obliterate Part III in its entirety or judicial review. The doctrine of basic structure is propounded to save the basic features. Article 21 is the heart of the Constitution. It confers right to life as well as right to choose. When this triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the "essence of right" test but also the "rights test" has to apply, particularly when *Kesavananda Bharati*¹ and *Indira Gandhi*¹¹ cases have expanded the scope of basic structure to cover even some of the fundamental rights. b

141. The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Articles 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure doctrine, the object of which is to protect basic features of the Constitution as indicated by the synoptic view of the rights in Part III. c

142. There is also a difference between the "rights test" and the "essence of right" test. Both form part of application of the basic structure doctrine. When in a controlled Constitution conferring limited power of amendment, an entire chapter is made inapplicable, "the essence of right" test^{††} as applied in *M. Nagaraj case*³³ will have no applicability. In such a situation, to judge the validity of the law, it is the "rights test" which is more appropriate. We may also note that in *Minerva Mills*⁵ and *Indira Gandhi*¹¹ cases elimination of Part III in its entirety was not in issue. We are considering the situation where the entire equality code, freedom code and right to move court under Part III are all nullified by exercise of power to grant immunisation at will by Parliament which, in our view, is incompatible with the implied limitation of d

⁴ *Waman Rao v. Union of India*, (1981) 2 SCC 362

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

¹¹ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

^{††} Ed.: See Shortnote U in *M. Nagaraj*, and para 37 thereof.

³³ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212

⁵ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625

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a the power of Parliament. In such a case, it is the rights test that is appropriate and is to be applied. In *Indira Gandhi case*¹¹ it was held that for the correct interpretation, Article 368 requires a synoptic view of the Constitution between its various provisions which, at first sight, look disconnected. Regarding Articles 31-A and 31-C (validity whereof is not in question here) having been held to be valid despite denial of Article 14, it may be noted that these articles have an indicia which is not there in Article 31-B.

b 143. Part III is amendable subject to basic structure doctrine. It is permissible for the legislature to amend the Ninth Schedule and grant a law the protection in terms of Article 31-B but subject to right of citizen to assail it on the enlarged judicial review concept. The legislature cannot grant fictional immunities and exclude the examination of the Ninth Schedule law by the court after the enunciation of the basic structure doctrine.

c 144. The constitutional amendments are subject to limitations and if the question of limitation is to be decided by Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. The authority to enact law and decide the legality of the limitations cannot vest in one organ. The validity to the limitation on the rights in Part III can only be examined by another independent organ, namely, the judiciary.

d 145. The power to grant absolute immunity at will is not compatible with basic structure doctrine and, therefore, after 24-4-1973 the laws included in the Ninth Schedule would not have absolute immunity. Thus, validity of such laws can be challenged on the touchstone of basic structure such as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles underlying these articles.

e 146. It has to be borne in view that the fact that some articles in Part III stand alone has been recognised even by Parliament, for example, Articles 20 and 21. Article 359 provides for suspension of the enforcement of the rights conferred by Part III during Emergencies. However, by the Constitution (Forty-fourth Amendment) Act, 1978, it has been provided that even during Emergencies, the enforcement of the rights under Articles 20 and 21 cannot be suspended. This is the recognition given by Parliament to the protections f granted under Articles 20 and 21. No discussion or argument is needed for the conclusion that these rights are part of the basic structure or framework of the Constitution and, thus, immunity by suspending those rights by placing any law in the Ninth Schedule would not be countenanced. It would be an implied limitation on the constituent power of amendment under Article 368. Same would be the position in respect of the rights under Article 32, again, a g part of the basic structure of the Constitution.

h 147. The doctrine of basic structure as a principle has now become an axiom. It is premised on the basis that invasion of certain freedoms needs to be justified. It is the invasion which attracts the basic structure doctrine. Certain freedoms may justifiably be interfered with. If freedom, for example, is interfered with in cases relating to terrorism, it does not follow that the same test can be applied to all the offences. The point to be noted is that the

¹¹ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

application of a standard is an important exercise required to be undertaken by the Court in applying the basic structure doctrine and that has to be done by the Courts and not by prescribed authority under Article 368. The existence of the power of Parliament to amend the Constitution at will, with requisite voting strength, so as to make any kind of laws that excludes Part III including power of judicial review under Article 32 is incompatible with the basic structure doctrine. Therefore, such an exercise if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles thereunder.

148. The power to amend the Constitution is subject to the aforesaid axiom. It is, thus, no more plenary in the absolute sense of the term. Prior to *Kesavananda Bharati*¹ the axiom was not there. Fictional validation based on the power of immunity exercised by Parliament under Article 368 is not compatible with the basic structure doctrine and, therefore, the laws that are included in the Ninth Schedule have to be examined individually for determining whether the constitutional amendments by which they are put in the Ninth Schedule damage or destroy the basic structure of the Constitution. This Court being bound by all the provisions of the Constitution and also by the basic structure doctrine has necessarily to scrutinise the Ninth Schedule laws. It has to examine the terms of the statute, the nature of the rights involved, etc. to determine whether in effect and substance the statute violates the essential features of the Constitution. For so doing, it has to first find whether the Ninth Schedule law is violative of Part III. If on such examination, the answer is in the affirmative, the further examination to be undertaken is whether the violation found is destructive of the basic structure doctrine. If on such further examination the answer is again in affirmative, the result would be invalidation of the Ninth Schedule law. Therefore, first the violation of rights of Part III is required to be determined, then its impact examined and if it shows that in effect and substance, it destroys the basic structure of the Constitution, the consequence of invalidation has to follow. Every time such amendment is challenged, to hark back to *Kesavananda Bharati*¹ upholding the validity of Article 31-B is a surest means of a drastic erosion of the fundamental rights conferred by Part III.

149. Article 31-B gives validation based on fictional immunity. In judging the validity of constitutional amendment we have to be guided by the impact test. The basic structure doctrine requires the State to justify the degree of invasion of fundamental rights. Parliament is presumed to legislate compatibly with the fundamental rights and this is where judicial review comes in. Greater the invasion into essential freedoms, greater is the need for justification and determination by Court whether invasion was necessary and if so, to what extent. The degree of invasion is for the Court to decide. Compatibility is one of the species of judicial review which is premised on compatibility with rights regarded as fundamental. The power to grant immunity, at will, on fictional basis, without full judicial review, will nullify the entire basic structure doctrine. The golden triangle referred to above is the basic feature of the Constitution as it stands for equality and rule of law.

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

150. The result of the aforesaid discussion is that the constitutional validity of the Ninth Schedule laws on the touchstone of basic structure doctrine can be adjudged by applying the direct impact and effect test i.e. rights test, which means the form of an amendment is not the relevant factor, but the consequence thereof would be determinative factor.

151. *In conclusion, we hold that:*

(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of the law, whether by amendment of any article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.

(ii) The majority judgment in *Kesavananda Bharati case*¹ read with *Indira Gandhi case*¹¹ requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

(iii) All amendments to the Constitution made on or after 24-4-1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

(iv) Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by constitutional amendments shall be a matter of constitutional adjudication by examining the nature and extent of infraction of a fundamental right by a statute, sought to be constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the articles in Part III as held in *Indira Gandhi case*¹¹. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such law(s) will not get the protection of the Ninth Schedule.

This is our answer to the question referred to us vide order dated 14-9-1999 in *I.R. Coelho v. State of T.N.*²

(v) If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the

¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 : 1973 Supp SCR 1

¹¹ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1

² (1999) 7 SCC 580

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principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24-4-1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder. a

(vi) Action taken and transactions finalised as a result of the impugned Acts shall not be open to challenge.

152. We answer the reference in the above terms and direct that the petitions/appeals be now placed for hearing before a three-Judge Bench for decision in accordance with the principles laid down herein. b

(2007) 2 Supreme Court Cases 112

(BEFORE DR. AR. LAKSHIMANAN AND TARUN CHATTERJEE, JJ.) c

UTTARANCHAL FOREST DEVELOPMENT

CORPN. AND ANOTHER

.. Appellants;

Versus

JABAR SINGH AND OTHERS

.. Respondents. d

Civil Appeals No. 5728 of 2006[†] with Nos. 5729-52, 5754-61 of 2006[‡],
decided on December 12, 2006

A. Labour Law — Factories Act, 1948 — Ss. 2(m), (k) — “Factory” — “Manufacturing process” — Cutting trees by axe and changing the shape of the timber into logs by using hand driven saw and removal, disposal and sale thereof undertaken by State Forest Development Corporation — Held, activity involves “manufacturing process” within the meaning of S. 2(k) — Areas of the forest where the said activity carried on covered by the word “premises” and hence constitute “factory” within the meaning of S. 2(m) — Forests — U.P. Forest Corporation Act, 1974 (4 of 1975), Ss. 14 and 15 — Words and phrases — “manufacturing process”, “factory”, “premises”, “alter” e

Held: f

The process of cutting of trees by axe and changing the shape of the timber into logs by saw both squarely fall within the definition of the first part of the manufacturing process as cutting would be included in the processes of “making” and “breaking up” included in the said definition. Further, the changing of shape by saw would be included in the processes of “altering” and “adapting” of the trees. Admittedly, trees and logs both fall within the meaning of “any article or substance”, the second part of the definition. Lastly, the conversion of trees into logs is admittedly for the purpose of sale, disposal, use and last but not the least for transport, all of which fall within the third part of the definition. The activity g

[†] Arising out of SLP (C) No. 24584 of 2003. From the Judgment and Order dated 21-8-2003 of the High Court of Uttarakhand at Nainital in WP No. 1376 (M/S) of 2001

[‡] Arising out of SLPs (C) Nos. 3189, 3399, 3553, 3738, 3740, 3793, 3795, 4361, 4386, 4391, 7548, 8552-53, 10712, 13267, 13425, 13446, 13813, 15433-34, 14327, 15498, 21789-91 of 2004, 5297, 24706, 25203, 25258, 25001, 25075 and 26042 of 2005 h

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(BEFORE K.G. BALAKRISHNAN, C.J. AND R.V. RAVEENDRAN
AND J.M. PANCHAL, JJ.)

a SELVI AND OTHERS . . . Appellants;
Versus

STATE OF KARNATAKA . . . Respondent.

Criminal Appeals No. 1267 of 2004[†] with Nos. 54-59 of 2005,
1199 of 2006, 1471 of 2007 and 987 & 990 of 2010[‡],
decided on May 5, 2010

b

A*. Criminal Trial — Investigation — Narcoanalysis, polygraph test (lie-detector test) and BEAP (Brain Electrical Activation Profile) test conducted against will of person subjected to such tests (the 'test subject') — Whether legally permissible — Voluntary undertaking of tests by test subject and extent of their admissibility in evidence — Held, tests when conducted under compulsion violate right against self-incrimination protected under Art. 20(3) and right to personal liberty protected under Art. 21 — Tests also violate the right to remain silent under S. 161(2) CrPC

c

— Though conducting of certain medical tests on accused is permissible under Explan. (a) to S. 53, Ss. 53-A and 54 CrPC, yet narcoanalysis, polygraph and BEAP tests are not included in those tests — General expression "such other tests" in Explan. (a) cannot be construed as covering these three tests because they are not of the same category to which tests specified in Explan. (a) belong — Interpretational rule of *ejusdem generis* does not permit their inclusion — Moreover, legislative intent is clear from the fact that Parliament while amending the said Explan. (a) in 2005 did not include these tests despite the fact that these tests were in existence at that time

d

e — These tests cannot also be accorded same treatment as is given to collection of specimen signatures and handwriting samples for the reason that specimen signatures and handwriting samples are not used as testimony against test subject but are used for identification or corroboration of facts already known to investigators

f — Arts. 20(3) & 21 of the Constitution and S. 161(2) CrPC are violated by narcoanalysis, polygraph and BEAP tests because of following reasons:

g — Art. 20(3) and S. 161(2) CrPC — These provisions protect accused, suspects and witnesses from being compelled to make self-incriminating statements — Testimonial compulsion is prohibited by law — Person concerned has right to remain silent on questions which may incriminate him — This protection is lost in case of narcoanalysis because test subject under the influence of drug (sodium pentothal) injected into his body loses control over his verbal responses and therefore cannot decide consciously about the questions which he should not answer — In polygraph test, physiological responses like blood pressure, respiratory flow, pulse rate, galvanic skin resistance, etc. are measured after putting certain questions to test subject — He has no conscious control over these responses — Similar is

h [†] From the Judgment and Order dated 10-9-2004 of the High Court of Karnataka at Bangalore in Cr. Petition No. 1964 of 2004

[‡] Arising out of SLPs (Crl.) Nos. 10 of 2006 and 6711 of 2007

* Ed.: See the *Shortnotes* below for the detail on each aspect summarised in *Shortnote A*.

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the case with BEAP test wherein electrical waves emanating from test subject's brain are studied in response to probes — All these techniques involve testimonial compulsion — Thus, test subject's right not to reveal any information which may incriminate him, is violated

— Art. 21 — Mental privacy which is an aspect of personal liberty under Art. 21, is intruded upon because common feature of these tests is that test subject's verbal or physiological responses are extracted in a manner that he has no conscious control over them — Such involuntary disclosure of information is also cruel, inhuman and degrading treatment to an individual, which is again a violation of Art. 21 — Impugned tests also violate right to fair trial because access to legal advice, which is a component of Art. 21, becomes meaningless when test subject is made to reveal information without having conscious control over it

— Voluntary undertaking of tests by test subject and extent of their admissibility in evidence — Held, is permissible provided certain safeguards like the one recommended by National Human Rights Commission (NHRC) in case of polygraph test are observed — Similar safeguards directed to be devised for narcoanalysis and BEAP test also — But even such test-results are not admissible in evidence except that they can be put to use for a limited purpose as indicated in S. 27, Evidence Act, 1872

— Constitution of India — Arts. 20(3) and 21 — Criminal Procedure Code, 1973 — Ss. 2(g), 53 Expln. (a), 53-A, 54 and 154 to 176 [particularly S. 161(2)] — Evidence Act, 1872 — Ss. 24 to 27 — Human and Civil Rights — Protection of Human Rights Act, 1993 — S. 12(d) — Employee Polygraph Protection Act, 1988 (USA) — Federal Rules of Evidence, 1975 (USA) — R. 702 — Rules of Evidence (New Mexico, USA) — Art. 707 — Interpretation of Statutes — Subsidiary rules — *Ejusdem generis* (Paras 262 to 265)

In this case, legality of three scientific tests, namely, narcoanalysis, polygraph test (lie-detector test) and Brain Electrical Activation Profile (BEAP) test, was challenged inter alia on the ground that these tests violate the test subject's rights under Articles 20(3) and 21 of the Constitution and under Section 161(2) of the Criminal Procedure Code, 1973.

In narcoanalysis, intravenous injection of sodium pentothal is given to test subject due to which the test subject enters into hypnotic trance, and answers questions put to him without having conscious control over the replies which may be incriminating to him. He may reveal information which he may otherwise conceal in a state of full consciousness.

In polygraph test, instruments like cardiographs, pneumographs, cardio-cuffs, sensitive electrodes, etc. are attached to test subject's body. Physiological responses like respiration, blood-pressure, blood flow, pulse rate, galvanic skin resistance, etc. in his body are measured after putting certain questions to him. Theory behind polygraph test is that when a person is giving false reply to an incriminating question put to him, he would produce physiological responses which are different from the responses given in normal course.

In BEAP test (which is also known as "P300 waves test"), electrical waves emitted from test subject's brain are recorded by attaching electrodes to his scalp. The test subject is exposed to auditory or visual stimuli (words, sounds, pictures, videos) that are relevant to the facts being investigated (known as material probes), alongside other irrelevant words and pictures (known as neutral probes). The underlying theory is that in case of guilty suspects, exposure to

material probes will lead to emission of P300 wave components. By examining records of these wave components, the examiner can make inferences about test subject's familiarity with information related to crime.

a

Holding all three tests to be impermissible, the Supreme Court held as above.

State v. Levitt, 36 NJ 266 (1961); *State v. Sinnott*, 132 A 2d 298 (1957), referred to *Frye v. United States*, 54 App DC 46 (1923); *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 F.3d 469 : 509 US 579 (1993); *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir 1995); *United States v. Posado*, 57 F.3d 428 (5th Cir 1995); *United States v. Galbreth*, 908 F.2d 877 (DNM 1995); *United States v. Cordoba*, 104 F.3d 225 (9th Cir 1997); *Brown v. Darcy*, 783 F.2d 1389 (9th Cir 1986); *United States v. Scheffer*, 140 F.3d 413 : 523 US 303 (1998); *R. v. Beland*, (1987) 36 CCC 3d 481 : (1987) 2 SCR 398 (Can SC); *Gillie v. Posho Ltd.*, (1939) 2 All ER 196 (PC); *State v. Hudson*, 314 Mo 599 (1926); *State v. Lindemuth*, 56 NM 237 (1952); *People v. Jones*, 42 Cal 2d 219 (1954); *Lindsey v. United States*, 237 F.2d 893 (9th Cir 1956); *Lawrence M. Dugan v. Commonwealth of Kentucky*, 333 SW 2d 755 (1960); *Townsend v. Sain*, 9 L.Ed 2d 770 : 372 US 293 (1962); *United States v. Swanson*, 572 F.2d 523 (5th Cir 1978); *United States v. Solomon*, 753 F.2d 1522 (9th Cir 1985); *United States v. Adams*, 581 F.2d 193 (9th Cir 1978); *State of New Jersey v. Darryl Pitts*, 56 A 2d 1320 (NJ 1989); *Horvath v. R.*, (1979) 44 CCC 2d 385 : (1979) 2 SCR 376 (Can SC); *Ibrahim v. R.*, 1914 AC 599 : (1914-15) All ER Rep 874 (PC); *Rock v. Arkansas*, 97 L.Ed 2d 37 : 483 US 44 (1987); *Harrington v. State*, 659 NW 2d 509 (2003) (Iowa SC); *Slaughter v. Oklahoma*, 105 P 3d 832 (2005).

b

c

d

e

36 American Criminal Law Review 87-116 (Winter 1999) at p. 91; 33 American Journal of Law and Medicine 377-421 (2007); 42(4) The Journal of Criminal Law, Criminology and Police Science 513-528 (November-December 1951); *Schaffer Library of Drug Policy*, <www.druglibrary.org>; 46(2) The Journal of Criminal Law, Criminology and Police Science 259-263 (July-August 1955); 62 Yale Law Journal 315-347 (February 1953); 40(3) Journal of Criminal Law and Criminology 370-380 (September-October 1949); 52(4) The Journal of Criminal Law, Criminology and Police Science 453-458 (November-December 1961); 50(2) The Journal of Criminal Law, Criminology and Police Science 118-123 (July-August 1959); 70 University of Missouri at Kansas City Law Review 891-920 (Summer 2002); Lawrence A. Farwell, *Brain Fingerprinting: A New Paradigm in Criminal Investigations and Counter-Terrorism* (2001) <www.brainwavescience.com>; 33 American Journal of Criminal Law 301-337 (Summer 2006); 33 American Journal of Law and Medicine 359-375 (2007); 29 Journal of Legal Medicine 179-197 (April-June 2008), discussed

f

Laboratory Procedure Manual—Polygraph Examination (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi, 2005), considered

B. Constitution of India — Art. 20(3) — Right against self-incrimination — Underlying purpose — Held, is to ensure integrity of the trial — Statement, if any, made by accused during investigation must be voluntary and reliable — Statement made out of compulsion may be false thus affecting the integrity of the trial — Investigating agencies, which are required to conduct meaningful investigation before subjecting a person to trial, should not have any scope of extracting statement through compulsive methods — Evidence Act, 1872 — Ss. 24 to 26 — Criminal Procedure Code, 1973 — Ss. 157, 161 and 162

g

Held :

h

Right against self-incrimination is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives—firstly, that of ensuring reliability of statements made by an accused, and secondly, ensuring that such statements are made voluntarily. It is possible that a person suspected or accused of a crime may have been compelled to testify

through methods involving coercion, threats or inducements during investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the rule against involuntary confessions is to ensure that testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead Judge and prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in investigation efforts. (Para 102)

Concerns about voluntariness of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, investigators would have a strong incentive to compel such statements—often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise use of interrogation tactics that violate dignity and bodily integrity of the person being examined. In this sense, right against self-incrimination is a vital safeguard against torture and other third-degree methods that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. Exclusion of compelled testimony is important otherwise investigators will be more inclined to extract information through such compulsion as a matter of course. Frequent reliance on such short cuts will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the right against self-incrimination is a vital protection to ensure that the prosecution discharges the said onus. (Para 103)

State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10; *Murphy v. Waterfront Commission of New York Harbor*, 12 L. Ed 2d 678 : 378 US 52 (1963); *Wong Kam-ming v. R.*, 1980 AC 247 : (1979) 2 W.L.R. 81 : (1979) 1 All ER 939 (PC); *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236, *relied on*

33 University of California Los Angeles Law Review 1063-1148 (1986); 27 Oxford Journal of Legal Studies 209-232 (Summer 2007), *referred to*

51 Journal of Criminal Law, Criminology and Police Science 138 (1960), *considered*

C. Constitution of India — Art. 20(3) — Rule against testimonial compulsion — Scope of the rule explained — Narcoanalysis, polygraph test, BEAP test, collection of specimen signatures and handwriting samples examined on the touchstone of rule — Held, oral or written statement conveying personal knowledge, likely to lead to incrimination by itself or furnishing a link in chain of evidence comes within the prohibition of Art. 20(3) — The rule however does not prohibit: (i) collection of material evidence such as bodily substances and other physical objects, and (ii) statement used for comparison with facts already known to investigators — Narcoanalysis, polygraph and BEAP tests result in testimonial compulsion but it is not so in the case of specimen signatures and handwriting samples — It is for this reason that narcoanalysis, polygraph and BEAP tests are not permissible in law while specimen signatures and handwriting samples are permissible — Evidence Act, 1872 — Ss. 24 to 26 and 47 — International Covenant on Civil and Political Rights, 1966 — Art. 14(3)(g) — European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 — Arts. 6(1) and 6(2)

(Paras 145, 147, 153, 157, 180, 185 and 189)

State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10, *followed*

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Schmerber v. California, 16 L. Ed 2d 908 : 384 US 757 (1965); *Saunders v. United Kingdom*, (1996) 23 EIRR 313, *relied on*

- a *Holt v. United States*, 54 L. Ed 1021 : 218 US 245 (1910), *referred to*
30 Cardozo Law Review 1023-46 (December 2008), *quoted*
94 Journal of Criminal Law and Criminology 243-293 (2004), *discussed*
State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10; *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cr LJ 865 : 1954 SCR 1077; *Schmerber v. California*, 16 L. Ed 2d 908 : 384 US 757 (1965), *relied on*
[Ed.: It is felt that the reasoning which has been applied to specimen signatures and handwriting samples is also applicable to fingerprint samples though it is not specifically discussed in this judgment. See also *H.P. Admn. v. Om Prakash*, (1972) 1 SCC 249; *State of Maharashtra v. Sukhdev Singh*, (1992) 3 SCC 700.]
- b

D. Constitution of India — Art. 20(3) — Right against self-incrimination — Incriminatory statement — How to ascertain whether statement is incriminatory — Depends upon the use to which it is put — Direct use, derivative use and transactional use of statement also explained — Evidence Act, 1872 — Ss. 24 to 27 — Criminal Procedure Code, 1973 — S. 162

Held :

- Where a person in custody is compelled to reveal information which aids investigation efforts, the information so revealed can prove to be incriminatory in the following ways: (1) statements made in custody could be directly relied upon by prosecution to strengthen their case. However, if it is shown that such statements were made under circumstances of compulsion, they will be excluded from evidence. (2) Another possibility is that of "derivative use" i.e. when information revealed during questioning leads to discovery of independent materials, thereby furnishing a link in the chain of evidence gathered by investigators. (3) Yet another possibility is that of "transactional use" i.e. when information revealed can prove to be helpful for investigation and prosecution in cases other than the one being investigated. (4) A common practice is that of extracting materials or information, which are then compared with materials that are already in the possession of investigators. For instance, handwriting samples and specimen signatures are routinely obtained for the purpose of identification or corroboration. (Para 128)
- d
- e

Nandini Satpathy v. P.L. Dani, (1978) 2 SCC 424 : 1978 SCC (Cri) 236; *Hoffman v. United States*, 95 L. Ed 1118 : 341 US 479 (1950); *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10, *relied on*

- f
- E. Constitution of India — Art. 20(3) — Right against self-incrimination — Compulsory administration of narcoanalysis, polygraph and BEAP tests — Whether tests should be permitted on the premise that it is not known at the time of conducting of tests whether test subject would make inculpatory or exculpatory statement — Held, distinction whether the statement is inculpatory or exculpatory is made at the trial stage whereas right to remain silent has to be exercised at the stage of investigation — Such right would be impaired if test subject first undergoes test and then it is decided whether his statement is inculpatory or exculpatory — Criminal Trial — Proof — Inculpatory/Exculpatory evidence (Paras 138 and 139)
- g

- h
- F. Evidence Act, 1872 — Ss. 24 to 26 — Right against self-incrimination — Exclusion of statement obtained by compulsive means — Held, only inculpatory statement stands excluded — Criminal Trial — Proof — Inculpatory/Exculpatory evidence (Paras 138 and 139)

G. Constitution of India — Art. 20(3) — Right against self-incrimination — Reasons for procedural safeguards like warning to be given to accused about his right to remain silent, etc. — Held, this is done to mitigate disadvantages faced by suspect in custodial environment — He should be made to understand fully contents of warning — Basis of development of law on this aspect in USA also explained — Held, the protection in USA is outcome of inter-relation between Fifth (privilege against self-incrimination) and Fourteenth Amendments (due process of law) and Fourth Amendment (protection against unreasonable searches and seizures) in US Constitution — Constitution of United States of America — Fourth, Fifth and Fourteenth Amendments (Paras 117 and 119)

Miranda v. Arizona, 16 L. Ed 2d 694 : 384 US 436 (1965); *Escobedo v. Illinois*, 12 L. Ed 2d 977 : 378 US 478 (1963), *relied on*

79 Harvard Law Review 21, 37 (1965), *relied on*

H. Constitution of India — Art. 20(3) — Right against self-incrimination — Administrative and quasi-criminal proceedings — Applicability of right to such proceedings and stage from which applicable — Held, right becomes available when a person has been formally accused (Para 125)

I. Constitution of India — Art. 20(3) — Right against self-incrimination — Its status in the Constitution — Held, it has an exalted status (Para 90)

J. Constitution of India — Art. 20(3) — Right against self-incrimination — Comparison of right under Art. 20(3) and under Ss. 161(2), 313(3) and 315(1) proviso, CrPC — Protection under S. 161(2), held, is wider than that under Art. 20(3) — Formal accusation is necessary to attract Art. 20(3) whereas S. 161(2) r/w S. 161(1) CrPC protects suspects and witnesses also, subject to obligation of witness under S. 132, Evidence Act to answer questions in suit or proceedings — Further held, protection afforded to witness is narrower compared to protection afforded to accused during trial under Ss. 313(3) and 315(1) proviso (b) CrPC — Criminal Procedure Code, 1973 — Ss. 161(2), 161(1), 313(3) and 315(1) proviso (b) — Evidence Act, 1872 — S. 132 proviso — Criminal Trial — Witnesses (Paras 121 to 123)

M.P. Sharma v. Satish Chandra, AIR 1954 SC 300 : 1954 Cr LJ 865 : 1954 SCR 1077;

State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962)

3 SCR 10; *Miranda v. Arizona*, 16 L. Ed 2d 694 : 384 US 436 (1965), *relied on*

Escobedo v. Illinois, 12 L. Ed 2d 977 : 378 US 478 (1963), *referred to*

79 Harvard Law Review 21, 37 (1965), *referred to*

Raja Narayanlal Bansilal v. Maneck Phiroz Mistry, AIR 1961 SC 29 : (1961) 1 SCR 417;

Ramesh Chandra Mehta v. State of W.B., AIR 1970 SC 940 : 1970 Cr LJ 863 : (1969) 2

SCR 461; *Bulkishan A. Devidayal v. State of Maharashtra*, (1980) 4 SCC 600 : 1981

SCC (Cri) 62, *relied on*

K. Constitution of India — Art. 20(3) — Right against self-incrimination under Art. 20(3) vis-à-vis theory of confirmation by subsequent facts, as incorporated in S. 27, Evidence Act, 1872 — Held, right against self-incrimination arises when incriminating statement is made out of compulsion — In the absence of compulsion, information received from accused in custody can be proved under S. 27, Evidence Act — Further held, there is no automatic presumption in India that custodial statement has been extracted through compulsion — There is therefore no requirement of additional diligence similar to *Miranda* warnings in USA — Evidence Act, 1872 — Ss. 24 to 27 — Criminal Procedure Code, 1973 — Ss. 162, 163 and 164 — Criminal Trial — Investigation — *Miranda* Warnings (USA) — Inapplicability in India (Paras 133 and 134)

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State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10, *followed*

Miranda v. Arizona, 16 L Ed 2d 694 : 384 US 436 (1965), *limited*

- a L. Constitution of India — Arts. 20(3) and 21 — Right against self-incrimination — If applicable when a person who is co-accused is offered immunity from prosecution in return for cooperating with investigators — Held, not directly applicable — Evidence Act, 1872 — S. 30 — Criminal Trial — Approver — Self-incrimination

Held :

- b The situation that compulsory administration of the impugned tests can prove to be useful in instances where the cooperating witness has difficulty in remembering relevant facts or is wilfully concealing crucial details, could arise when a person who is a co-accused is offered immunity from prosecution in return for cooperating with investigators. Even though right against self-incrimination is not directly applicable in such situations, relevant legal enquiry is whether compulsory administration of the impugned tests meets requisite standard of substantive due process for placing restraints on personal liberty.

(Para 140)

- c M. Constitution of India — Art. 20(3) — Kinds of evidence and their admissibility — Three kinds of evidence, namely, oral, documentary and material — Oral evidence — Compulsory extraction of — Held, is prohibited by Art. 20(3) r/w S. 161(2) CrPC — Documentary evidence — Admissibility of — Held, is decided by trial court but parties are obliged to produce it — Material or physical evidence — Compulsory extraction of — Held, is not hit by Art. 20(3) — Compulsory extraction of oral or written evidence is also permissible if it is to be used for identification or comparison with material and information already in possession of investigators — Criminal Procedure Code, 1973 — Ss. 161, 53, 53-A and 54 — Evidence Act, 1872 — Ss. 3, 5, 24 to 27 and 59 to 65 — Criminal Trial — Proof

(Para 179)

- d N. Constitution of India — Arts. 21 and 20(3) — Right to personal liberty — Scope — Validity of narcoanalysis, polygraph and BEAP tests — Wider perspective of personal liberty, held, is required to cover situations not specifically covered by Art. 20(3) — Undesirable effects of these tests in certain situations are not taken care of by Art. 20(3) and therefore validity of these tests is to be examined from wider perspective of personal liberty under Art. 21, which includes right to mental privacy, right against cruel, inhuman and degrading treatment and right to fair trial — Mere fact that use of reasonable force in exercise of police power and taking of samples of bodily substances (like hair, blood, etc.) is permissible in law, does not necessarily mean that narcoanalysis, polygraph and BEAP tests should also be permitted without examining their effect on test subject's rights under Art. 21 — Criminal Procedure Code, 1973, Ss. 53, 53-A and 54

(Paras 190 to 196 and 203)

Rochin v. California, 96 L Ed 183 : 342 US 165 (1951), *relied on*

State of Maharashtra v. Sheshappa Dudhappa Tambade, AIR 1964 Bom 253; *Breithaupt v. Abram*, 11 L Ed 2d 448 : 352 US 432 (1956); *Jamshed v. State of U.P.*, 1976 Cr LJ 1680 (All); *Ananth Kumar Naik v. State of A.P.*, 1977 Cr LJ 1797 (AP); *Anil Anant Rao Lokhande v. State of Maharashtra*, 1981 Cr LJ 125 (Bom), *approved*

- h *Brown v. Mississippi*, 80 L Ed 682 : 297 US 278 (1935), *referred to*

O. Constitution of India — Arts. 21 and 20(3) — Right to privacy — Basis, scope and extent — Privacy as an aspect of personal liberty — Mental privacy and physical privacy — Held, while physical privacy may be curtailed to some extent in reasonable exercise of police powers under CrPC, there is no corresponding provision for intruding upon a person's mental privacy — Extracting testimonial responses by means of narcoanalysis, polygraph and BEAP tests, held, intrude upon a person's mental privacy and are therefore impermissible in law — Protection of mental privacy is available to accused as well as to victim of an offence — A female who alleges to be victim of sexual offence cannot be subjected to polygraph test to ascertain whether she is making truthful allegation — Evidence Act, 1872 — Ss. 24 to 27 and 114-A — Criminal Procedure Code, 1973 — S. 164-A — Criminal Law — Laboratory Procedure Manual for Polygraph Examination — Para 3.4(v) — European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 — Art. 8 — Police and Criminal Evidence Act, 1984 (UK), S. 64(1-A)

Held :

A distinction must be made between the character of restraints placed on the right to privacy. While ordinary exercise of police powers contemplates restraints of a physical nature such as extraction of bodily substances and use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to forcible extraction of testimonial responses. In conceptualising right to privacy, distinction between privacy in a physical sense and the privacy of one's mental processes, has to be kept in view. (Para 224)

So far, judicial understanding of privacy in India has mostly stressed on protection of body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person to impart personal knowledge about a relevant fact. Theory of interrelationship of rights mandates that right against self-incrimination should also be read as a component of personal liberty under Article 21. Hence, understanding of right to privacy should account for its intersection with Article 20(3). Furthermore, rule against involuntary confessions as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads to a clear answer. Importance of personal autonomy must be recognised in aspects such as choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties. (Para 225)

M.P. Sharma v. Satish Chandra, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077;

Kharak Singh v. State of U.P., AIR 1963 SC 1295 : (1963) 2 Cri LJ 329; *Maneka Gandhi*

v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597; *Gobind v. State of M.P.*, (1975)

2 SCC 148 : 1975 SCC (Cri) 468; *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632;

People's Union for Civil Liberties v. Union of India, (1997) 1 SCC 301; *'X' v. Hospital*

'Z', (2003) 1 SCC 500; *Attorney General's Reference (No. 3 of 1999)*, (2001) 2 AC 91 :

(2001) 2 WLR 56 : (2001) 1 All ER 577 (HL), relied on

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M. Vijaya v. Singareni Collieries Co. Ltd., AIR 2001 AP 502; *R.(S) v. Chief Constable of the South Yorkshire Police*, (2002) 1 W.L.R. 3223 : (2003) 1 All ER 148 (CA), approved

- a *'X' v. Hospital 'Z'*, (1998) 8 SCC 296, held, partly overruled
94 Journal of Criminal Law and Criminology 243-293 (2004), relied on

Medical test for ascertaining mental condition of a person is most likely to be in the nature of a psychiatric evaluation which usually includes testimonial responses. Subjecting a person to the impugned techniques (narcoanalysis, lie-detector and BEAP tests) in an involuntary manner violates prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with right against self-incrimination. However, this determination does not account for circumstances where a person could be subjected to any of the impugned tests but not exposed to criminal charges and the possibility of conviction. In such cases, he/she could still face adverse consequences such as custodial abuse, surveillance, undue harassment and social stigma among others. In order to address such circumstances, it is important to examine some other dimensions of Article 21. (Paras 204 and 226)

- c There is possibility that victims of offences could be forcibly subjected to any of these techniques during the course of investigation. There is provision in *Laboratory Procedure Manual* for polygraph tests which contemplates the same for ascertaining the testimony of victims of sexual offences. Irrespective of the need to expedite investigations in such cases, no person who is a victim of an offence can be compelled to undergo any of the tests in question. Such a forcible administration would be an unjustified intrusion into mental privacy and could lead to further stigma for the victim. (Para 254)

- d P. Constitution of India — Art. 21 — Right against cruel, inhuman and degrading treatment — Right to dignity — Right against mental torture — Whether such right violated by narcoanalysis, polygraph and BEAP tests —
e Held, these tests are methods of interrogation which impair test subject's decision-making capacity, which is an affront to human dignity and liberty — Moreover, incriminating test results may prompt investigating agencies to inflict mental pain on test subject — Such a treatment is violative of Art. 21 — Impugned tests cannot also be permitted on the reasoning that infliction of some pain or suffering is unavoidable in practice of medicine and that law also permits it in the form of punishments which are prescribed for various offences —
f Held, society governed by rules and liberal values have to make rational distinction between various circumstances where pain or suffering is to be permitted or to be prohibited — Universal Declaration of Human Rights, 1948 — Art. 5 — International Covenant on Civil and Political Rights, 1966 — Art. 7 — U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 — Arts. 1 and 16 —
g U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988 — Principles 1, 6 and 21 — Geneva Convention Relative to the Treatment of Prisoners of War, 1949 — Art. 17 — Narcoanalysis — Polygraph/Lie-detector test — BEAP/P300 waves test — Evidence Act, 1872 — Ss. 24 to 26

Held:

- h During narcoanalysis, the test subject loses awareness of place and passing of time. All the three impugned techniques (narcoanalysis, lie-detector and

BEAP tests) can be described as methods of interrogation which impair test subject's capacity of decision or judgment. Compulsory administration of impugned techniques constitutes cruel, inhuman or degrading treatment in the context of Article 21. Law disapproves involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same. The popular perceptions of terms such as "torture" and "cruel, inhuman or degrading treatment" are associated with gory images of blood-letting and broken bones. However, it has to be recognised that forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences. (Paras 244, 239 to 242 and 245) a

Marcy Strauss, 'Criminal Defence in the Age of Terrorism — Torture', *quoted* b

Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 : 1979 SCC (Cri) 155; *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *D.K. Basu v. State of W.B.*, (1997) 1 SCC 416 : 1997 SCC (Cri) 92, *relied on*

20 American University International Law Review 521-612 (2005), *quoted*

48 New York Law School Law Review 201-274 (2003/2004), *quoted* c

Q. Constitution of India — Art. 21 — Right to fair trial — Facets of — Held, right is violated in compulsory administration of narcoanalysis, polygraph and BEAP tests on account of following reasons,

— (i) access to legal advice, which is an essential component of right to fair trial, is rendered meaningless because test subject has no control over his verbal or physiological responses, d

— (ii) test subject may not be able to defend himself effectively because results of tests may be used against him but may not be communicated to him in time,

— (iii) reliability of these tests is questionable and therefore proof beyond reasonable doubt, which is an essential feature of criminal trial, may not be possible through these tests,

— (iv) credibility of so-called experts who administer these tests, is also doubtful, e

— (v) trial Judge who presides at evidentiary as well trial phases, may be prejudiced by results of these tests even if tests may not be admitted in evidence,

— (vi) test results, in some cases have resulted in public pressure, particularly when test results are inculpatory, which is not desirable in the interest of fair trial, f

— (vii) tests disturb parity of procedural safeguards between prosecution and defence; if prosecution is to be allowed to conduct these tests, similar demand from accused or witnesses has also to be conceded,

— (viii) tests have potential of increasing frivolous litigation by demanding fresh proceedings and conducting of tests — Criminal Trial — Media trial — Misuse of forensic test results (Paras 247 to 253) g

R. v. Beland, (1987) 36 CCC 3d 481 : (1987) 2 SCR 398 (Can SC), *relied on*

United States v. Scheffer, 140 L Ed 2d 413 : 523 US 303 (1998), *relied on*

R. Constitution of India — Arts. 21 and 20(3) — Personal liberty — Wider dimensions of — Non-penal consequences like custodial violence, increased police surveillance and harassment — Held, such vices though not covered by protective shield of Art. 20(3) and S. 161(2) CrPC, yet are h

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- prohibited by Art. 21 — One of the reasons for declaring narcoanalysis, polygraph and BEAP tests as invalid is that a test subject who refuses to undergo these tests may be exposed to such non-penal consequences —
- a Criminal Procedure Code, 1973 — S. 161(2) (Paras 143 and 144)
- Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155, *relied on*
- S. Constitution of India — Art. 21 and Pt. III — Constitutional values, held, have to be infused in all branches of law including procedural areas such as law of evidence (Para 111)
- b *Rochin v. California*, 96 L Ed 183 : 342 US 165 (1951), *relied on*
- T. Constitution of India — Arts. 20(3) and 21 — Right against self-incrimination — Right to fair trial — Inter-relation between the two rights — Held, the inter-relation is recognised in most jurisdictions — In India too, Art. 20(3) has to be interpreted as a facet of the wider right of personal liberty under Art. 21 — Right of refusal to answer questions that may incriminate a person, is a procedural safeguard which bears close relation with the right to fair trial under Art. 21 (Paras 87, 88 and 92)
- c *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *Rochin v. California*, 96 L. Ed 183 : 342 US 165 (1951), *relied on*
- U. Constitution of India — Arts. 20(3) and 21 — Right against self-incrimination and right to personal liberty — Exceptions if can be created by court in public interest — Whether court should permit compulsory administration of narcoanalysis, polygraph and BEAP tests on the ground that public interest would be served in the following situations (i) tests may become necessary in emergency as in the case of likely terrorist attack, (ii) tests would prevent police from resorting to third-degree methods, and (iii) selective use of tests can be resorted to, in case of heinous offences only — Held, rights under Arts. 20(3) and 21 have been given non-derogable status and therefore cannot be compromised on the ground
- d of so-called public interest — Moreover, grounds of public interest projected in this case do not have sound basis — This is because tests are a gradually unfolding process which require time as well as expertise — Their results cannot be obtained on emergent basis — Use of third-degree methods by police, though deplorable, cannot be taken as a reason for permitting these tests because tests themselves are constitutionally impermissible and therefore one vice cannot be substituted by another — There is also no certainty that tests, once permitted, would be put to selective use in case of heinous offences only and not progress down a slippery slope — Besides, permitting such qualified use would amount to law-making by court which is outside the judicial domain — Constitutional values, which are meant for whole of India and for future generations, have to be preserved irrespective of individual cases wherein some hardened criminals who have no regard
- e for societal values, may be benefited by court ruling in this case
- g V. Constitution of India — Pt. III — Public interest — Whether overrides constitutional guarantees/freedoms
- W. Constitution of India — Arts. 32, 226 and 136 — Constitutional adjudication — Scope and ambit — Factors involved — Practical considerations, future generations and personal sensibilities of Judges —
- h Balancing of — Judiciary

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Held :

Ordinarily it is the task of legislature to arrive at a pragmatic balance between often competing interests of personal liberty and public safety. The Supreme Court as a constitutional court can only seek to preserve balance between these competing interests as reflected in the text of the Constitution and its subsequent interpretation. There is absolutely no ambiguity on the status of principles such as the right against self-incrimination and various dimensions of personal liberty. Rights guaranteed in Articles 20 and 21 of the Constitution have been given a non-derogable status and they are available to citizens as well as foreigners. It is not within the competence of judiciary to create exceptions and limitations on the availability of these rights. (Paras 256 to 259)

57 Stanford Law Review 209-255 (October 2004); 39 Loyola University Chicago Law Journal 329-360 (Winter 2008), *quoted*

Even though the main task of constitutional adjudication is to safeguard core organising principles of Indian polity, there are certain practical concerns that strengthen the case against involuntary administration of the tests in question. (Para 257)

One of the main functions of constitutionally prescribed rights is to safeguard interests of citizens in their interactions with the Government. As guardians of these rights, the Court will be failing in its duty if the Court permits any citizen to be forcibly subjected to the tests in question. One could argue that some of the parties who will benefit from this decision are hardened criminals who have no regard for societal values. However, it must be borne in mind that in constitutional adjudication the Court's concerns are not confined to the facts at hand but extend to implications of Court's decision for the whole population as well as future generations. (Para 260)

Sometimes there are apprehensions about Judges imposing their personal sensibilities through broadly worded terms such as "substantive due process", but in this case Court's inquiry has been based on a faithful understanding of principles entrenched in the Constitution. (Para 261)

Public Committee Against Torture in Israel v. State of Israel, (1999) 7 BIIRC 31 : HC 5100/94 (1999) (SC of Israel), *relied on*

X. Constitution of India — Arts. 20, 21, 32 and 359 — Non-derogable status of Arts. 20 and 21 — Held, right to move court for enforcement of rights conferred by Arts. 20 and 21 cannot be suspended even during Emergency, by virtue of Art. 359 — Rights under Arts. 20 and 21 therefore have a non-derogable status (Para 89)

Y. Constitution of India — Arts. 20(3) and 21 — Right to fair trial — Facets — Right against self-incrimination, right to be represented by a lawyer and right to compulsory process — Historical basis of the said rights explained — Magna Carta — Petition of Right, 1628 (English) — Treason Act, 1695 (c. 3) (English) — Justices Protection Act, 1848 (English) (Paras 92 to 100)

Z. Criminology — Criminal Jurisprudence — Standards of — Protections afforded to accused such as presumption of innocence, right to counsel, right to be informed of charges, right to compulsory process, proof beyond reasonable doubt, etc., held, have been evolved as standards of criminal jurisprudence (Paras 92 to 100)

- Z.A. Constitution of India — Arts. 20(3) and 21 — Right against self-incrimination — Right to counsel — Inter-relationship between rights — Segregation between testimonial function performed by accused and defensive function performed by lawyer — Right to remain silent, held, became meaningful after right to counsel was recognised — Said segregation is an essential feature of fair trial so as to ensure level playing field between prosecution and defence (Para 100)**
- a 84(1) Political Science Quarterly 1-29 (March 1969), *quoted*
92(5) Michigan Law Review 1047-1085 (March 1994), *quoted*
- b *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236; *Brown v. Walker*, 40 L. Ed 819 : 161 US 591 (1895); *Miranda v. Arizona*, 16 L. Ed 2d 694 : 384 US 436 (1965), *relied on*
- Z.B. Criminal Procedure Code, 1973 — S. 53 Expln. (a) [as substituted by 2005 Amendment] — Tests which can be conducted on accused — Whether narcoanalysis, polygraph and BEAP tests covered by general expression “such other tests” occurring in Expln. (a) — Held, general expression, which comes after specific tests enumerated in Expln. (a), has to be interpreted by applying principle of *ejusdem generis* — Specific tests include examination of bodily substances and therefore general expression cannot be construed to include tests which reveal testimonial responses — Besides, Parliament while amending Expln. (a) in 2005 was presumed to be aware of latest techniques yet did not include narcoanalysis, polygraph and BEAP tests — These tests are therefore not covered by expression “such other tests” (Paras 169 to 173)**
- c
- d
- Z.C. Interpretation of Statutes — Basic rules — Legislative intention — Inquiry into — Impracticability — Held, while it is open to courts to examine legislative history, it is not proper for court to try and conclusively ascertain legislative intent — Such an inquiry is impracticable because court does not have access to all materials which would have been considered by legislature (Para 170)**
- e *Thogorani v. State of Orissa*, 2004 Cri LJ 4003 (Ori), *approved*
Bhondur v. Emperor, AIR 1931 Cal 601; *Devum Shamji Patel v. State of Maharashtra*, AIR 1959 Bom 284, *referred to*
Sharda v. Dhurmpal, (2003) 4 SCC 493, *discussed*
- f *Due Process and the American Criminal Trial*, 38 Australian Law Journal 223, 231 (1964), *referred to*
Royal College of Nursing of the United Kingdom v. Deptt. of Health and Social Security, 1981 AC 800 : (1981) 2 WLR 279 : (1981) 1 All ER 545 (HL); *Senior Electric Inspector v. Laxminarayana Chopra*, AIR 1962 SC 159, *relied on*
G.P. Singh: *Principles of Statutory Interpretation*, 10th Edn. (2006) at pp. 239-47, *quoted*
Sharda v. Dhurmpal, (2003) 4 SCC 493, *relied on*
- g *Mahipal Muderna v. State of Rajasthan*, 1971 Cri LJ 1405 (Raj); *Jamshed v. State of U.P.*, 1976 Cri LJ 1680 (All), *discussed*
United Nations General Assembly, “*Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment of punishment*” [GA Res 37/194, 111th Plenary Meeting on 18-12-1982], *referred to*
- Z.D. Criminal Procedure Code, 1973 — S. 53 Expln. (a) — Compulsory medical examination — Use of reasonable force — Permissibility**
- h

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Held :

Medical examination of an arrested person can be directed during the course of an investigation either at the instance of the investigating officer or arrested person himself. It is also within the powers of a court to direct such a medical examination on its own. Medical examination can also be directed in respect of a person who has been released from custody on bail as well as a person who has been granted anticipatory bail. Section 53 which contemplates use of "force as is reasonably necessary" for conducting a medical examination implies that once a court has directed medical examination of a particular person it is within the powers of investigators and examiners to resort to a reasonable degree of physical force for conducting the same. (Para 166) a

ZI. Criminal Procedure Code, 1973 — S. 53 Expln. (a) — DNA profile and DNA sample — Difference between — Explained — Uses of DNA profile also indicated

Held :

DNA profiling technique has been expressly included among various forms of medical examination in amended Explanation to Section 53 CrPC. DNA profile is different from a DNA sample which can be obtained from bodily substances. A DNA profile is a record created on the basis of DNA samples made available to forensic experts. Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can be readily matched with existing profiles that are already in the possession of law-enforcement agencies. Matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts. (Para 220) c

ZI. Criminal Procedure Code, 1973 — S. 161(2) — Right to remain silent — Scope of protection under S. 161(2) — Whether protection available in non-criminal proceedings also — Held, protection flows from provisions of CrPC and is therefore available in proceedings under CrPC — Non-criminal proceedings, even though resulting in some punitive action are not covered — Evidence Act, 1872 — Ss. 21 and 23 — Constitution of India — Art. 20(3) d

Held :

Since extension of the right against self-incrimination to suspects and witnesses has its basis in Section 161(2) CrPC, it is not readily available to persons who are examined during proceedings that are not governed by CrPC. There is a distinction between proceedings of a purely criminal nature and those proceedings which can culminate in punitive remedies and yet cannot be characterised as criminal proceedings. Ordinarily Article 20(3) cannot be invoked by witnesses during proceedings that cannot be characterised as criminal proceedings. In administrative and quasi-criminal proceedings, the protection of Article 20(3) becomes available only after a person has been formally accused of committing an offence. (Para 125) e

Raja Narayanlal Bansilal v. Maneck Phiroz Mistry, AIR 1961 SC 29 : (1961) 1 SCR 417; *Ramesh Chandra Mehta v. State of W.B.*, AIR 1970 SC 940 : 1970 Cri LJ 863 : (1969) 2 SCR 461; *Balkishan A. Devidayal v. State of Maharashtra*, (1980) 4 SCC 600 : 1981 SCC (Cri) 62. *relied on* g

ZG. Criminal Procedure Code, 1973 — Ss. 313(3), 315(1) proviso (b) and 161(2) — Rule against adverse inference from silence of accused at trial — Held, the rule flows from combined reading of CrPC provisions and Art. 20(3) — Constitution of India — Art. 20(3) — Evidence Act, 1872 — S. 114 III. (g) h

Held :

- a Indian law incorporates the rule against adverse inferences from silence which is operative at trial stage. This position is embodied in a conjunctive reading of Article 20(3) of the Constitution and Sections 161(2), 313(3) and proviso (b) of Section 315(1) CrPC. Even though an accused is a competent witness in his/her own trial, he/she cannot be compelled to answer questions that could expose him/her to incrimination and the trial Judge cannot draw adverse inferences from refusal to do so. This position is cemented by prohibiting any of the parties from commenting on the failure of the accused to give evidence.

(Para 141)

Woolmington v. Director of Public Prosecutions, 1935 AC 462 : 1935 All ER Rep 1 (III),
relied on

180th Report of the Law Commission of India (May 2002), quoted

- c Z1. Criminal Procedure Code, 1973 — Ss. 39, 156(1), 161(1), 161(2), 313(3) and 315(1) proviso (b) — Citizens' cooperation in criminal investigation vis-à-vis right against self-incrimination — Right guaranteed by Art. 20(3) against self-incrimination, held, has overriding effect — Provisions contained in Ss. 39, 156(1) and 161(1) CrPC are subject to right against self-incrimination — No adverse inference can be drawn against an accused who chooses to remain silent — Constitution of India — Art. 20(3) — Right against self-incrimination — Scope — Persons covered

(Paras 90 and 91)

- d Z1. Evidence Act, 1872 — Ss. 24, 25 and 26 — Statements made by a person in custody — Unreliability of statement — Reasons for unreliability indicated — Doctrine of "excluding the fruit of a poisonous tree", held, is incorporated in Ss. 24 to 26 — Criminal Procedure Code, 1973 — Ss. 161(2), 313(3), 315 proviso (b)

e *Held :*

Statements made in custody are considered to be unreliable unless they have been subjected to cross-examination or judicial scrutiny. Scheme created by the Code of Criminal Procedure and the Evidence Act also mandates that confessions made before police officers are ordinarily not admissible as evidence and it is only statements made in the presence of a Judicial Magistrate which can be given weightage. The doctrine of "excluding the fruit of a poisonous tree" has been incorporated in Sections 24, 25 and 26 of the Evidence Act, 1872.

(Para 132)

- g ZJ. Medical Practice and Practitioners — Medical ethics — Doctor-patient privilege — Exceptions — Use of medical knowledge in criminal investigation — Held, is permissible within certain limits — Testimonial acts such as results of psychiatric examination cannot however be used in evidence without subject's informed consent — Criminal Procedure Code, 1973 — S. 53 Expln. (a) — Medical Jurisprudence — Toxicology — Principles of medical ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment or punishment — U.N. Principles of Medical Ethics, 1982, Principle 4

(Para 178)

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ZK. International Law — International Conventions — U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 — Domestic court if bound — Held, though India is signatory to this Convention yet it has not been ratified by Parliament nor has any corresponding legislation been enacted under Art. 253 — Domestic court therefore not absolutely bound by Convention but it has significant persuasive value because it represents evolving international consensus on human rights norms — Constitution of India — Art. 253 (Para 236)

K-D/46217/CR

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The Judgment of the Court was delivered by

K.G. BALAKRISHNAN, C.J.— Leave granted in SLPs (Crl.) Nos. 10 of 2006 and 6711 of 2007.

2. The legal questions in this batch of criminal appeals relate to the involuntary administration of certain scientific techniques, namely, narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases. This issue has received considerable attention since it involves tensions between the desirability of efficient investigation and the preservation of individual liberties. Ordinarily, the judicial task is that of evaluating the rival contentions in order to arrive at a sound conclusion. However, the present case is not an ordinary dispute between private parties. It raises pertinent questions about the meaning and scope of the fundamental rights which are available to all citizens. Therefore, we must examine the implications of permitting the use of the impugned techniques in a variety of settings.

3. Objections have been raised in respect of instances where individuals who are the accused, suspects or witnesses in an investigation have been subjected to these tests without their consent. Such measures have been defended by citing the importance of extracting information which could help the investigating agencies to prevent criminal activities in the future as well as in circumstances where it is difficult to gather evidence through ordinary means.

4. In some of the impugned judgments, reliance has been placed on certain provisions of the Code of Criminal Procedure, 1973 and the Evidence Act, 1872 to refer back to the responsibilities placed on citizens to fully cooperate with the investigating agencies. It has also been urged that administering these techniques does not cause any bodily harm and that the extracted information will be used only for strengthening investigation efforts and will not be admitted as evidence during the trial stage. The assertion is that improvements in fact finding during the investigation stage will consequently help to increase the rate of prosecution as well as the rate of acquittal. Yet another line of reasoning is that these scientific techniques are a softer alternative to the regrettable and allegedly widespread use of "third-degree methods" by investigators.

5. The involuntary administration of the impugned techniques prompts questions about the protective scope of the "right against self-incrimination" which finds place in Article 20(3) of our Constitution. In one of the impugned judgments, it has been held that the information extracted through methods such as "polygraph examination" and the "Brain Electrical Activation Profile (BEAP) test" cannot be equated with "testimonial compulsion" because the test subject is not required to give verbal answers, thereby falling outside the protective scope of Article 20(3). It was further ruled that the verbal revelations made during a narcoanalysis test do not attract the bar of Article 20(3) since the inculpatory or exculpatory nature of these revelations is not known at the time of conducting the test.

6. To address these questions among others, it is necessary to inquire into the historical origins and rationale behind the "right against self-incrimination". The principal questions are whether this right extends to the investigation stage and whether the test results are of a "testimonial" character, thereby attracting the protection of Article 20(3). Furthermore, we must examine whether relying on the test results or materials discovered with the help of the same creates a reasonable likelihood of incrimination for the test subject.

7. We must also deal with the arguments invoking the guarantee of "substantive due process" which is part and parcel of the idea of "personal liberty" protected by Article 21 of the Constitution. The first question in this regard is whether the provisions in the Code of Criminal Procedure, 1973 that provide for "medical examination" during the course of investigation can be read expansively to include the impugned techniques, even though the latter are not explicitly enumerated. To answer this question, it will be necessary to discuss the principles governing the interpretation of statutes in light of scientific advancements. Questions have also been raised with respect to the professional ethics of the medical personnel involved in the administration of these techniques. Furthermore, Article 21 has been judicially expanded to include a "right against cruel, inhuman or degrading treatment", which requires us to determine whether the involuntary administration of the impugned techniques violates this right whose scope corresponds with evolving international human rights norms. We must also

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consider contentions that have invoked the test subject's "right to privacy", both in a physical and mental sense.

8. The scientific validity of the impugned techniques has been questioned and it is argued that their results are not entirely reliable. For instance, the narcoanalysis technique involves the intravenous administration of sodium pentothal, a drug which lowers inhibitions on the part of the subject and induces the person to talk freely. However, empirical studies suggest that the drug-induced revelations need not necessarily be true. Polygraph examination and the BFEAP test are methods which serve the respective purposes of lie detection and gauging the subject's familiarity with information related to the crime. These techniques are essentially confirmatory in nature, wherein inferences are drawn from the physiological responses of the subject. However, the reliability of these methods has been repeatedly questioned in empirical studies. In the context of criminal cases, the reliability of scientific evidence bears a causal link with several dimensions of the right to a fair trial such as the requisite standard of proving guilt beyond reasonable doubt and the right of the accused to present a defence. We must be mindful of the fact that these requirements have long been recognised as components of "personal liberty" under Article 21 of the Constitution. Hence it will be instructive to gather some insights about the admissibility of scientific evidence.

9. In the course of the proceedings before this Court, oral submissions were made by Mr Rajesh Mahale, Advocate (Criminal Appeal No. 1267 of 2004), Mr Manoj Goel, Advocate (Criminal Appeals Nos. 56-57 of 2005), Mr Santosh Paul, Advocate (Criminal Appeal No. 54 of 2005) and Mr Harish Salve, Senior Advocate (Criminal Appeals Nos. 1199 of 2006 and 1471 of 2007)—all of whom argued against the involuntary administration of the impugned techniques.

10. Arguments defending the compulsory administration of these techniques were presented by Mr Goolam E. Vahanvati, Solicitor General of India [now Attorney General for India] and Mr Anoop G. Chaudhari, Senior Advocate who appeared on behalf of the Union of India. These were further supported by Mr T.R. Andhyarujina, Senior Advocate who appeared on behalf of the Central Bureau of Investigation (CBI) and Mr Sanjay Hegde, Advocate who represented the State of Karnataka. Mr Dushyant Dave, Senior Advocate, rendered assistance as amicus curiae in this matter.

11. At this stage, it will be useful to frame the questions of law and outline the relevant sub-questions in the following manner:

I. Whether the involuntary administration of the impugned techniques violates the "right against self-incrimination" enumerated in Article 20(3) of the Constitution?

I-A. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?

I-B. Whether the results derived from the impugned techniques amount to "testimonial compulsion" thereby attracting the bar of Article 20(3)?

- II. Whether the involuntary administration of the impugned techniques is a reasonable restriction on "personal liberty" as understood in the context of Article 21 of the Constitution?*

- a* 12. Before answering these questions, it is necessary to examine the evolution and specific uses of the impugned techniques. Hence, a description of each of the test procedures is followed by an overview of their possible uses, both within and outside the criminal justice system. It is also necessary to gauge the limitations of these techniques. Owing to the dearth of Indian decisions on this subject, we must look to precedents from foreign jurisdictions which deal with the application of these techniques in the area of criminal justice.

Descriptions of tests — Uses, limitations and precedents

Polygraph examination

- c* 13. The origins of polygraph examination have been traced back to the efforts of Lombroso, a Criminologist who experimented with a machine that measured blood pressure and pulse to assess the honesty of persons suspected of criminal conduct. His device was called a hydrosphygmograph. A similar device was used by Psychologist William Marston during World War I in espionage cases, which proved to be a precursor to its use in the criminal justice system. In 1921, John Larson incorporated the measurement of respiration rate and by 1939 Leonard Keeler added skin conductance and an amplifier to the parameters examined by a polygraph machine.

- d* 14. The theory behind polygraph tests is that when a subject is lying in response to a question, he/she will produce physiological responses that are different from those that arise in the normal course. During the polygraph examination, several instruments are attached to the subject for measuring and recording the physiological responses. The examiner then reads these results, analyses them and proceeds to gauge the credibility of the subject's answers. Instruments such as cardiographs, pneumographs, cardio-cuffs and sensitive electrodes are used in the course of the polygraph examinations. They measure changes in aspects such as respiration, blood pressure, blood flow, pulse and galvanic skin resistance. The truthfulness or falsity on part of the subject is assessed by relying on the records of the physiological responses. [See *Laboratory Procedure Manual—Polygraph Examination* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi, 2005).]

- e* 15. There are three prominent polygraph examination techniques:
- f* (i) The relevant-irrelevant (R-I) technique.
 - g* (ii) The control-question (CQ) technique.
 - (iii) Directed lie control (DLC) technique.

- h* Each of these techniques includes a pre-test interview during which the subject is acquainted with the test procedure and the examiner gathers the information which is needed to finalise the questions that are to be asked. An important objective of this exercise is to mitigate the possibility of a feeling

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of surprise on the part of the subject which could be triggered by unexpected questions. This is significant because an expression of surprise could be mistaken for physiological responses that are similar to those associated with deception. [Refer David Gallai, "Polygraph Evidence in Federal Courts: Should it be Admissible?"¹.] Needless to say, the polygraph examiner should be familiar with the details of the ongoing investigation. To meet this end the investigators are required to share copies of documents such as the first information report (FIR), medico-legal reports (MLR) and post-mortem reports (PMR) depending on the nature of the facts being investigated.

16. The control-question (CQ) technique is the most commonly used one and its procedure as well as scoring system has been described in the materials submitted on behalf of CBI. The test consists of control questions and relevant questions. The control questions are irrelevant to the facts being investigated but they are intended to provoke distinct physiological responses as well as false denials. These responses are compared with the responses triggered by the relevant questions. Theoretically, a truthful subject will show greater physiological responses to the control questions which he/she has reluctantly answered falsely, than to the relevant questions, which the subject can easily answer truthfully. Conversely, a deceptive subject will show greater physiological responses while giving false answers to the relevant questions in comparison to the responses triggered by false answers to the control questions. In other words, a guilty subject is more likely to be concerned with lying about the relevant facts as opposed to lying about other facts in general. An innocent subject will have no trouble in truthfully answering the relevant questions but will have trouble in giving false answers to the control questions. The scoring of the tests is done by assigning a numerical value, positive or negative, to each response given by the subject. After accounting for all the numbers, the result is compared to a standard numerical value to indicate the overall level of deception. The net conclusion may indicate truth, deception or uncertainty.

17. The use of polygraph examinations in the criminal justice system has been contentious. In this case, we are mainly concerned with situations when investigators seek reliance on these tests to detect deception or to verify the truth of previous testimonies. Furthermore, litigation related to polygraph tests has also involved situations where the suspects and defendants in criminal cases have sought reliance on them to demonstrate their innocence. It is also conceivable that witnesses can be compelled to undergo polygraph tests in order to test the credibility of their testimonies or to question their mental capacity or to even attack their character.

18. Another controversial use of polygraph tests has been on victims of sexual offences for testing the veracity of their allegations. While several States in USA have enacted provisions to prohibit such use, the text of the *Laboratory Procedure Manual for Polygraph Examination* indicates that this

¹ 36 American Criminal Law Review 87-116 (Winter 1999) at p. 91

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is an acceptable use. In this regard, Para 3.4(v) of the said Manual reads as follows:

- a "3.4. (v) In cases of alleged sex offences such as intercourse with a female child, forcible rape, indecent liberties or perversion, it is important that the victim, as well as the accused, be made available for interview and polygraph examination. It is essential that the polygraph examiner get a first-hand detailed statement from the victim, and the interview of the victim precede that of the suspect or witnesses. ..."
- b The following article includes a table which lists out the statutorily permissible uses of polygraph examination in different State jurisdictions of the United States of America: [Henry T. Greely and Judy Illes, "Neuroscience-based Lie Detection: The Urgent Need for Regulation"².]
- c 19. The propriety of compelling the victims of sexual offences to undergo a polygraph examination certainly merits consideration in the present case. It must also be noted that in some jurisdictions polygraph tests have been permitted for the purpose of screening public employees, both at the stage of recruitment and at regular intervals during the service period. In USA, the widespread acceptance of polygraph tests for checking the antecedents and monitoring the conduct of public employees has encouraged private employers to resort to the same. In fact the Employee Polygraph Protection Act, 1988 was designed to restrict their use for employee screening. This development must be noted because the unqualified acceptance of "lie detector tests" in India's criminal justice system could have the unintended consequence of encouraging their use by private parties.
- d 20. Polygraph tests have several limitations and therefore a margin for errors. The premise behind these tests is questionable because the measured changes in physiological responses are not necessarily triggered by lying or deception. Instead, they could be triggered by nervousness, anxiety, fear, confusion or other emotions. Furthermore, the physical conditions in the polygraph examination room can also create distortions in the recorded responses. The test is best administered in comfortable surroundings where there are no potential distractions for the subject and complete privacy is maintained. The mental state of the subject is also vital since a person in a state of depression or hyperactivity is likely to offer highly disparate physiological responses which could mislead the examiner. In some cases the subject may have suffered from loss of memory in the intervening time period between the relevant act and the conduct of the test. When the subject does not remember the facts in question, there will be no self-awareness of truth or deception and hence the recording of the physiological responses will not be helpful. Errors may also result from "memory-hardening" i.e. a process by which the subject has created and consolidated false memories about a particular incident. This commonly occurs in respect of recollections of traumatic events and the subject may not be aware of the fact that he/she is lying.
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² 33 American Journal of Law and Medicine 377-421 (2007)

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21. The errors associated with polygraph tests are broadly grouped into two-categories i.e. "false positives" and "false negatives". A "false positive" occurs when the results indicate that a person has been deceitful even though he/she answered truthfully. Conversely a "false negative" occurs when a set of deceptive responses is reported as truthful. On account of such inherent complexities, the qualifications and competence of the polygraph examiner are of the utmost importance. The examiner needs to be thorough in preparing the questionnaire and must also have the expertise to account for extraneous conditions that could lead to erroneous inferences. However, the biggest concern about polygraph tests is that an examiner may not be able to recognise deliberate attempts on part of the subject to manipulate the test results. Such "countermeasures" are techniques which are deliberately used by the subject to create certain physiological responses in order to deceive the examiner. The intention is that by deliberately enhancing one's reaction to the control questions, the examiner will incorrectly score the test in favour of truthfulness rather than deception. The most commonly used "countermeasures" are those of creating a false sense of mental anxiety and stress at the time of the interview, so that the responses triggered by lying cannot be readily distinguished.

22. Since polygraph tests have come to be widely relied upon for employee screening in USA, the US Department of Energy had requested the National Research Council of the National Academies (NRC) to review their use for different purposes. The following conclusion was stated in its report, i.e. *The Polygraph and Lie Detection: Committee to Review the Scientific Evidence on the Polygraph* (Washington DC: National Academies Press, 2003) at pp. 212-13:

"Polygraph accuracy.—Almost a century of research in scientific psychology and physiology provides little basis for the expectation that a polygraph test could have extremely high accuracy. The physiological responses measured by the polygraph are not uniquely related to deception. That is, the responses measured by the polygraph do not all reflect a single underlying process: a variety of psychological and physiological processes, including some that can be consciously controlled, can affect polygraph measures and test results. Moreover, most polygraph testing procedures allow for uncontrolled variation in test administration (e.g. creation of the emotional climate, selecting questions) that can be expected to result in variations in accuracy and that limit the level of accuracy that can be consistently achieved.

Theoretical basis.—The theoretical rationale for the polygraph is quite weak, especially in terms of differential fear, arousal, or other emotional states that are triggered in response to relevant or comparison questions. We have not found any serious effort at construct validation of polygraph testing.

Research progress.—Research on the polygraph has not progressed over time in the manner of a typical scientific field. It has not

a accumulated knowledge or strengthened its scientific underpinnings in any significant manner. Polygraph research has proceeded in relative isolation from related fields of basic science and has benefited little from conceptual, theoretical, and technological advances in those fields that are relevant to the psychophysiological detection of deception.

b *Future potential.—The inherent ambiguity of the physiological measures used in the polygraph suggest that further investments in improving polygraph technique and interpretation will bring only modest improvements in accuracy.* (italicised in original)

c 23. A Working Party of the British Psychological Society (BPS) also came to a similar conclusion in a study published in 2004. The key finding is reproduced below [cited from: *A Review of the Current Scientific Status and Fields of Application of Polygraph Deception Detection—Final Report* (6-10-2004) from 'The British Psychological Society (BPS) Working Party at p. 10]:

d "A polygraph is sometimes called a lie detector, but this term is misleading. A polygraph does not detect lies, but only arousal which is assumed to accompany telling a lie. Polygraph examiners have no other option than to measure deception in such an indirect way, as a pattern of physiological activity directly related to lying does not exist (Saxe, 1991). Three of the four most popular lie detection procedures using the polygraph (relevant/irrelevant test, control-question test and directed lie test) are built upon the premise that, while answering so-called 'relevant' questions, liars will be more aroused than while answering so-called 'control' questions, due to a fear of detection (fear of getting caught lying). This premise is somewhat naive as truth tellers may also be more aroused when answering the relevant questions, particularly: (i) when these relevant questions are emotion evoking questions (e.g. when an innocent man, suspected of murdering his beloved wife, is asked questions about his wife in a polygraph test, the memory of his late wife might reawaken his strong feelings about her); and (ii) when the innocent examinee experiences fear, which may occur, for example, when the person is afraid that his or her honest answers will not be believed by the polygraph examiner. The other popular test (guilty knowledge test) is built upon the premise that guilty examinees will be more aroused concerning certain information due to different orienting reactions, that is, they will show enhanced orienting responses when recognising crucial details of a crime. This premise has strong support in psychophysiological research (Fiedler, Schmidt & Stahl, 2002)."

g 24. Coming to judicial precedents, a decision reported as *Frye v. United States*³ dealt with a precursor to the polygraph which detected deception by measuring changes in systolic blood pressure. In that case the defendant was subjected to this test before the trial and his counsel had requested the court that the scientist who had conducted the same should be allowed to give expert testimony about the results. Both the trial court and the appellate court

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rejected the request for admitting such testimony. The appellate court identified the considerations that would govern the admissibility of expert testimony based on scientific insights. It was held, *ibid.* at p. 47:

"... Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognised scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."

25. The standard of "general acceptance in the particular field" governed the admissibility of scientific evidence for several decades. It was changed much later by the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc.*⁴ In that case the petitioners had instituted proceedings against a pharmaceutical company which had marketed "Bendectin", a prescription drug. They had alleged that the ingestion of this drug by expecting mothers had caused birth defects in the children born to them. To contest these allegations, the pharmaceutical company had submitted an affidavit authored by an epidemiologist. The petitioners had also submitted expert opinion testimony in support of their contentions. The District Court had ruled in favour of the company by ruling that their scientific evidence met the standard of "general acceptance in the particular field" whereas the expert opinion testimony produced on behalf of the petitioners did not meet the said standard. The Court of Appeals for the Ninth Circuit upheld the judgment and the case reached the US Supreme Court which vacated the appellate court's judgment and remanded the case back to the trial court. It was unanimously held that the "general acceptance" standard articulated in *Frye*³ had since been displaced by the enactment of the Federal Rules of Evidence in 1975, wherein Rule 702 governed the admissibility of expert opinion testimony that was based on scientific findings. This Rule provided that:

"702. *Testimony by experts.*—If scientific, technical, or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise...."

⁴ 125 L. Ed 2d 469 : 509 US 579 (1993)

³ *Frye v. United States*, 5-1 App DC 46 (1923)

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26. It was held in *Daubert case*⁴ that the trial court should have evaluated the scientific evidence as per Rule 702 of the Federal Rules of Evidence which mandates an inquiry into the relevance as well as the reliability of the scientific technique in question. The majority opinion (Blackmun, J.) noted that the trial Judge's first step should be a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and whether it can be properly applied to the facts in issue. Several other considerations will be applicable, such as:

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- b
 - whether the theory or technique in question can be and has been tested;
 - whether it has been subjected to peer review and publication;
 - its known or potential error rate;
 - the existence and maintenance of standards controlling its operation; and
- c
 - whether it has attracted widespread acceptance within the scientific community.

27. It was further observed in *Daubert case*⁴ that such an inquiry should be a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. It was reasoned that instead of the wholesale exclusion of scientific evidence on account of the high threshold of proving "general acceptance in the particular field", the same could be admitted and then challenged through conventional methods such as cross-examination, presentation of contrary evidence and careful instructions to the juries about the burden of proof. In this regard, the trial Judge is expected to perform a "gatekeeping" role to decide on the admission of expert testimony based on scientific techniques. It should also be kept in mind that Rule 403 of the Federal Rules of Evidence, 1975 empowers a trial Judge to exclude any form of evidence if it is found that its probative value will be outweighed by its prejudicial effect.

28. Prior to *Daubert*⁴ decision, most jurisdictions in USA had disapproved of the use of polygraph tests in criminal cases. Some State jurisdictions had absolutely prohibited the admission of polygraph test results, while a few had allowed consideration of the same if certain conditions were met. These conditions included a prior stipulation between the parties to undergo these tests with procedural safeguards such as the involvement of the experienced examiners, presence of the counsel and proper recording to enable subsequent scrutiny. A dissonance had also emerged in the treatment of polygraph test results in the different Circuit jurisdictions, with some jurisdictions giving trial Judges the discretion to enquire into the reliability of polygraph test results on a case-by-case basis.

29. For example, in *United States v. Piccinonna*⁵ it was noted that in some instances polygraphy satisfied the standard of "general acceptance in the particular field" as required by *Frye*³. It was held that polygraph

h ⁴ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 F.3d 469 : 509 US 579 (1993)

⁵ 885 F.2d 1529 (11th Cir 1989)

³ *Frye v. United States*, 54 App DC 46 (1923)

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testimony could be admissible under two situations, namely, when the parties themselves agree on a stipulation to this effect or for the purpose of impeaching and corroborating the testimony of witnesses. It was clarified that polygraph examination results could not be directly used to bolster the testimony of a witness. However, they could be used to attack the credibility of a witness or even to rehabilitate one after his/her credibility has been attacked by the other side. Despite these observations, the trial court did not admit the polygraph results on remand in this particular case. a

30. However, after *Daubert*⁴ prescribed a more liberal criterion for determining the admissibility of scientific evidence, some courts ruled that weightage could be given to polygraph results. For instance in *United States v. Posado*⁶, the facts related to a pre-trial evidentiary hearing where the defendants had asked for the exclusion of forty-four kilograms of cocaine that had been recovered from their luggage at an airport. The District Court had refused to consider polygraph evidence given by the defendants in support of their version of events leading up to the seizure of the drugs and their arrest. On appeal, the Fifth Circuit Court held that the rationale for disregarding polygraph evidence did not survive *Daubert*⁴ decision. The Court proceeded to remand the case to the trial court and directed that the admissibility of the polygraph results should be assessed as per the factors enumerated in *Daubert*⁴. It was held *ibid.* at p. 434: b c d

"There can be no doubt that tremendous advances have been made in polygraph instrumentation and technique in the years since *Frye*³. The test at issue in *Frye*³ measured only changes in the subject's systolic blood pressure in response to test questions. [*Frye v. United States*³] Modern instrumentation detects changes in the subject's blood pressure, pulse, thoracic and abdominal respiration, and galvanic skin response. Current research indicates that, when given under controlled conditions, the polygraph technique accurately predicts truth or deception between seventy and ninety per cent of the time. Remaining controversy about test accuracy is almost unanimously attributed to variations in the integrity of the testing environment and the qualifications of the examiner. Such variation also exists in many of the disciplines and for much of the scientific evidence we routinely find admissible under Rule 702. [See *McCormick on Evidence*, 206 at 915 & n. 57.] Further, there is good indication that polygraph technique and the requirements for professional polygraphists are becoming progressively more standardized. In addition, polygraph technique has been and continues to be subjected to extensive study and publication. Finally, polygraph is now so widely used by employers and government agencies alike. e f g

To iterate, we do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the per se

4 *Daubert v. Merrill Dow Pharmaceuticals Inc.*, 125 L. Ed 2d 469 : 509 US 579 (1993)

6 57 F 3d 428 (5th Cir 1995)

3 *Frye v. United States*, 54 App DC 46 (1923)

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- a rule against admissibility, which was based on antiquated concepts about the technical ability of the polygraph and legal precepts that have been expressly overruled by the Supreme Court.” (internal citations omitted)

Despite these favourable observations, the polygraph results were excluded by the District Court on remand.

- b 31. However, we have come across at least one case decided after *Daubert*¹ where a trial court had admitted expert opinion testimony about polygraph results. In *United States v. Galbreth*² the District Court took note of Article 707 of the Rules of Evidence of New Mexico, USA which established standards for the admission of polygraph evidence. The said provision laid down that polygraph evidence would be admissible only when the following conditions are met: the examiner must have had at least 5 years’ experience in conducting polygraph tests and 20 hours of continuing education within the past year; the polygraph examination must be tape recorded in its entirety; the polygraph charts must be scored quantitatively in a manner generally accepted as reliable by polygraph experts; all polygraph materials must be provided to the opposing party at least 10 days before trial; and all polygraph examinations conducted on the subject must be disclosed. It was found that all of these requirements had been complied with in the facts at hand. The District Court concluded with these words, *ibid.* at p. 896:

- d “... the Court finds that the expert opinion testimony regarding the polygraph results of defendant Galbreth is admissible. However, because the evidentiary reliability of opinion testimony regarding the results of a particular polygraph test is dependent upon a properly conducted examination by a highly qualified, experienced and skilful examiner, nothing in this opinion is intended to reflect the judgment that polygraph results are per se admissible. Rather, in the context of the polygraph technique, the trial courts must engage upon a case specific inquiry to determine the admissibility of such testimony.”

- e 32. We were also alerted to the decision in *United States v. Cordoba*³. In that case, the Ninth Circuit Court concluded that the position favouring absolute exclusion of unstipulated polygraph evidence had effectively been overruled in *Daubert*⁴. The defendant had been convicted for the possession and distribution of cocaine since the drugs had been recovered from a van which he had been driving. However, when he took an unstipulated polygraph test, the results suggested that he was not aware of the presence of drugs in the van. At the trial stage, the prosecution had moved to suppress the test results and the District Court had accordingly excluded the polygraph evidence. However, the Ninth Circuit Court remanded the case back after finding that the trial Judge should have adopted the parameters enumerated in *Daubert*¹ to decide on the admissibility of the polygraph test results. It was observed, *ibid.* at p. 228:

h ¹ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 L. Ed 2d 469 : 509 US 579 (1993)
² 908 F Supp 877 (DNM 1995)
³ 104 F 3d 225 (9th Cir 1997)

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"With this holding, we are not expressing new enthusiasm for admission of unstipulated polygraph evidence. The inherent problematic nature of such evidence remains. As we noted in *Brown*⁹, polygraph evidence has grave potential for interfering with the deliberative process. [F 2d at pp. 1396-97.] However, these matters are for determination by the trial Judge who must not only evaluate the evidence under Rule 702, but consider admission under Rule 403. Thus, we adopt the view of Judge Jameson's dissent in *Brown*⁹ that these are matters which must be left to the sound discretion of the trial court, consistent with *Daubert*¹ standards." a b

33. The decisions cited above had led to some uncertainty about the admissibility of polygraph test results. However, this uncertainty was laid to rest by an authoritative ruling of the US Supreme Court in *United States v. Scheffer*¹⁰. In that case, an eight-Judge majority decided that the Military Rule of Evidence, §707 (which made polygraph results inadmissible in court-martial proceedings) did not violate an accused person's Sixth Amendment right to present a defence. The relevant part of the provision is as follows: c

"(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." d

34. The facts in *Scheffer case*¹⁰ were that Scheffer, a US Air Force serviceman had faced the court-martial proceedings because a routine urinalysis showed that he had consumed methamphetamines. However, a polygraph test suggested that he had been truthful in denying the intentional consumption of the drugs. His defence of "innocent ingestion" was not accepted during the court-martial proceedings and the polygraph results were not admitted in evidence. The Air Force Court of Criminal Appeals affirmed the decision given in the court-martial proceedings but the Court of Appeals for the Armed Forces reversed the same by holding that an absolute exclusion of polygraph evidence (offered to rebut an attack on the credibility of the accused) would violate Scheffer's Sixth Amendment right to present a defence. Hence, the matter reached the Supreme Court which decided that the exclusion of polygraph evidence did not violate the said constitutional right. Eight Judges agreed that testimony about polygraph test results should not be admissible on account of the inherent unreliability of the results obtained. Four Judges agreed that reliance on polygraph results would displace the fact-finding role of the jury and lead to a collateral litigation. In the words of Clarence Thomas, J., *ibid.* at p. 309: e f g

"Rule 707 serves several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the jury's role in determining credibility, h

⁹ *Brown v. Durcy*, 783 F.2d 1389 (9th Cir 1986)

¹⁰ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 L. Ed 2d 469 : 509 US 579 (1993)

¹¹ 140 L. Ed 2d 413 : 523 US 303 (1998)

a and avoiding litigation that is collateral to the primary purpose of the trial. The rule is neither arbitrary nor disproportionate in promoting these ends. Nor does it implicate a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents."

35. On the issue of reliability, the Court took note of some Circuit Court decisions which had permitted trial courts to consider polygraph results in accordance with the *Daubert*¹ factors. However, the following stance was adopted, *ibid.* at p. 312:

b "... Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams. Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. We cannot say, then, that presented with such widespread uncertainty, the President acted arbitrarily or disproportionately in promulgating a per se rule excluding all polygraph evidence."

c 36. Since a trial by jury is an essential feature of the criminal justice system in USA, concerns were expressed about preserving the jury's core function of determining the credibility of testimony. It was observed, *ibid.* at p. 314:

d "... Unlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in the respondent's case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt. ..."

f 37. On the issue of encouraging litigation that is collateral to the primary purpose of a trial, it was held, *ibid.* at p. 314:

g "... Allowing proffers of polygraph evidence would inevitably entail assessments of such issues as whether the test and control questions were appropriate, whether a particular polygraph examiner was qualified and had properly interpreted the physiological responses, and whether other factors such as countermeasures employed by the examinee had distorted the exam results. Such assessments would be required in each and every case. It thus offends no constitutional principle for the President to conclude that a per se rule excluding all polygraph evidence is appropriate. Because litigation over the admissibility of polygraph

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¹ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 L.Ed 2d 469 : 509 US 579 (1993)

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evidence is by its very nature collateral, a per se rule prohibiting its admission is not an arbitrary or disproportionate means of avoiding it."

In the same case, Kennedy, J., filed an opinion which was joined by four Judges. While there was agreement on the questionable reliability of polygraph results, a different stand was taken on the issues pertaining to the role of the jury and the concerns about collateral litigation. It was observed that the inherent reliability of the test results is a sufficient ground to exclude the polygraph test results and expert testimony related to them. Stevens, J., filed a dissenting opinion in this case.

38. We have also come across a decision of the Canadian Supreme Court in *R. v. Beland*¹¹. In that case the respondents had been charged with conspiracy to commit robbery. During their trial, one of their accomplices had given testimony which directly implicated them. The respondents contested this testimony and after the completion of the evidentiary phase of the trial, they moved an application to reopen their defence while seeking permission for each of them to undergo a polygraph examination and produce the results in evidence. The trial Judge denied this motion and the respondents were convicted. However, the appellate court allowed their appeal from conviction and granted an order to reopen the trial and directed that the polygraph results be considered. On further appeal, the Supreme Court of Canada held that the results of a polygraph examination are not admissible as evidence. The majority opinion explained that the admission of polygraph test results would offend some well-established rules of evidence. It examined the "rule against oath-helping" which prohibits a party from presenting evidence solely for the purpose of bolstering the credibility of a witness. Consideration was also given to the "rule against admission of past or out-of-court statements by a witness" as well as the restrictions on producing "character evidence". The discussion also concluded that polygraph evidence is inadmissible as "expert evidence".

39. With regard to the "rule against admission of past or out-of-court statements by a witness", McIntyre, J. observed (in para 11):

"... In my view, the rule against admission of consistent out-of-court statements is soundly based and particularly apposite to questions raised in connection with the use of the polygraph. Polygraph evidence when tendered would be entirely self-serving and would shed no light on the real issues before the court. Assuming, as in the case at Bar, that the evidence sought to be adduced would not fall within any of the well-recognized exceptions to the operation of the rule—where it is permitted to rebut the allegation of a recent fabrication or to show physical, mental or emotional condition—it should be rejected. To do otherwise is to open the trial process to the time-consuming and confusing consideration of collateral issues and to deflect the focus of the proceedings from their fundamental issue of guilt or innocence. This view is summarized by D.W. Elliott in 'Lie Detector Evidence: Lessons

¹¹ (1987) 36 CCC 3d 481; (1987) 2 SCR 398 (Can SC)

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from the American Experience' in *Well and Truly Tried** (1982), at pp. 129-30:

- a A defendant who attempts to put in the results of a test showing this truthfulness on the matters in issue is bound to fall foul of the rule against self-serving statements or, as it is sometimes called, the rule that a party cannot manufacture evidence for himself, and the falling foul will not be in any mere technical sense. The rule is sometimes applied in a mechanical unintelligent way to exclude evidence about which no realistic objection could be raised, as the leading case, *Gillie v. Posho Ltd.*¹² shows; but striking down defence polygraph evidence on this ground would be no mere technical reflex action of legal obscurantists. The policy behind the doctrine is a fundamental one, and defence polygraph evidence usually offends it fundamentally. As some Judges have pointed out, only those defendants who successfully take examinations are likely to want the results admitted. There is no compulsion to put in the first test results obtained. A defendant can take the test many times, if necessary 'examiner-shopping', until he gets a result which suits him. Even stipulated tests are not free of this taint, because of course his lawyers will advise him to have several secret trial runs before the prosecution is approached. If nothing else, the dry runs will habituate him to the process and to the expected relevant questions."
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40. On the possibility of using polygraph test results as character evidence, it was observed (para 14):

- e "... What is the consequence of this rule in relation to polygraph evidence? Where such evidence is sought to be introduced it is the operator who would be called as the witness and it is clear, of course, that the purpose of his evidence would be to bolster the credibility of the accused and, in effect, to show him to be of good character by inviting the inference that he did not lie during the test. In other words, it is evidence not of general reputation but of a specific incident and its admission would be precluded under the rule. It would follow, then, that the introduction of evidence of the polygraph tests would violate the character evidence rule."
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41. McIntyre, J. offered the following conclusions (at paras 18, 19 and 20):

- g "18. In conclusion, it is my opinion, based upon a consideration of rules of evidence long established and applied in our courts, that the polygraph has no place in the judicial process where it is employed as a tool to determine or to test the credibility of witnesses. It is frequently argued that the polygraph represents an application of modern scientific knowledge and experience to the task of determining the veracity of human utterances. It is said that the courts should welcome this device and not cling to the imperfect methods of the past in such an important
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* Edited by Finid Campbell and Louis Waller
12 (1939) 2 All ER 196 (PC)

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task. This argument has a superficial appeal, but, in my view, it cannot prevail in the face of realities of court procedures.

19. I would say at once that this view is not based on a fear of the inaccuracies of the polygraph. On that question we were not supplied with sufficient evidence to reach a conclusion. However, it may be said that even the finding of a significant percentage of errors in its results would not, by itself, be sufficient ground to exclude it as an instrument for use in the courts. Error is inherent in human affairs, scientific or unscientific. It exists within our established court procedures and must always be guarded against. The compelling reason, in my view, for the exclusion of the evidence of polygraph results in judicial proceedings is twofold. First, the admission of polygraph evidence would run counter to the well-established rules of evidence which have been referred to. Second, while there is no reason why the rules of evidence should not be modified where improvement will result, it is my view that the admission of polygraph evidence will serve no purpose which is not already served. It will disrupt proceedings, cause delays, and lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists.

20. Since litigation replaced trial by combat, the determination of fact, including the veracity of parties and their witnesses, has been the duty of Judges or juries upon an evaluation of the statements of witnesses. This approach has led to the development of a body of rules relating to the giving and reception of evidence and we have developed methods which have served well and have gained a wide measure of approval. They have facilitated the orderly conduct of judicial proceedings and are designed to keep the focus of the proceedings on the principal issue, in a criminal case, the guilt or innocence of the accused. What would be served by the introduction of evidence of polygraph readings into the judicial process? To begin with, it must be remembered that however scientific it may be, its use in court depends on the human intervention of the operator. Whatever results are recorded by the polygraph instrument, their nature and significance reach the trier of fact through the mouth of the operator. Human fallibility is therefore present as before, but now it may be said to be fortified with the mystique of science. ..."

Narcoanalysis technique

42. This test involves the intravenous administration of a drug that causes the subject to enter into a hypnotic trance and become less inhibited. The drug-induced hypnotic stage is useful for investigators since it makes the subject more likely to divulge information. The drug used for this test is sodium pentothal, higher quantities of which are routinely used for inducing general anaesthesia in surgical procedures. This drug is also used in the field of psychiatry since the revelations can enable the diagnosis of mental disorders. However, we have to decide on the permissibility of resorting to

a this technique during a criminal investigation, despite its established uses in the medical field. The use of "truth-serums" and hypnosis is not a recent development. Earlier versions of the narcoanalysis technique utilised substances such as scopolamine and sodium amytal.

43. The following extracts from an article trace the evolution of this technique [cited from C.W. Muehlberger, "Interrogation under Drug Influence: The So-called 'Truth Serum' Technique",¹³ *The Journal of Criminal Law, Criminology and Police Science* at pp. 513-14]:

b "With the advent of anaesthesia about a century ago, it was observed that during the induction period and particularly during the recovery interval, patients were prone to make extremely naive remarks about personal matters, which, in their normal state, would never have revealed.

c Probably the earliest direct attempt to utilize this phenomenon in criminal interrogation stemmed from observations of a mild type of anaesthesia commonly used in obstetrical practice during the period of about 1903-1915 and known as 'twilight sleep'. This anaesthesia was obtained by hypodermic injection of solutions of morphine and scopolamine (also called 'hyoscine') followed by intermittent chloroform inhalations if needed. The pain relieving qualities of morphine are well known. Scopolamine appears to have the added property of blocking out memories of recent events. By the combination of these drugs in suitable dosage, morphine dulled labor pains without materially interfering with the muscular contractions of labor, while scopolamine wiped out subsequent memories of the delivery room ordeal. The technique was widely used in Europe but soon fell into disrepute among obstetricians of this country, largely due to overdosage.

e During the period of extensive use of 'twilight sleep' it was a common experience that women who were under drug influence, were extremely candid and uninhibited in their statements. They often made remarks which obviously would never have been uttered when in their normal state. Dr. Robert E. House, an observant physician practising in Ferris, Texas, believed that a drug combination which was so effective in the removal of ordinary restraints and which produced such utter candor, might be of value in obtaining factual information from persons who were thought to be lying. Dr. House's first paper presented in 1922 suggested drug administration quite similar to the standard 'twilight sleep' procedure: an initial dose of 1/4 grain of morphine sulphate together with 1/100 grain of scopolamine hydrobromide, followed at 20-30 minute intervals with smaller (1/200-1/400 grain) doses of scopolamine and periods of light chloroform anaesthesia. Subjects were questioned as they recovered from the light chloroform anaesthesia and gave answers which subsequently proved to be true. Altogether, Dr. House reported about half-a-dozen cases, several of which were

h ¹³ 42(4) *The Journal of Criminal Law, Criminology and Police Science* 513-528 (November-December 1951)

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instrumental in securing the release of convicts from State prisons, he also observed that, after returning to their normal state, these subjects had little or no recollection of what had transpired during the period of interrogation. They could not remember what questions had been asked, nor by whom; neither could they recall any answers which they had made." a

44. The use of the "scopolamine" technique led to the coining of the expression "truth serum". With the passage of time, injections of sodium amytal came to be used for inducing subjects to talk freely, primarily in the field of psychiatry. The author cited above has further observed, *ibid.* at p. 522: b

"During World War II, this general technique of delving into a subject's inner consciousness through the instrumentality of narcotic drugs was widely used in the treatment of war neuroses (sometimes called 'battle shock' or 'shell shock'). Fighting men who had been through terrifically disturbing experiences often times developed symptoms of amnesia, mental withdrawal, negativity, paralyses, or many other mental, nervous, and physical derangements. In most instances, these patients refused to talk about the experiences which gave rise to the difficulty, and psychiatrists were at a loss to discover the crux of the problem. To intelligently counteract such a force, it was first necessary to identify it. Thus, the use of sedative drugs, first to analyze the source of disturbance (narcoanalysis) and later to obtain the proper frame of mind in which the patient could and would 'talk out' his difficulties, and, as they say 'get them off his chest'—and thus relieve himself (narcosynthesis or narco-therapy)—was employed with signal success. c

In the narcoanalysis of war neuroses a very light narcosis is most desirable. With small doses of injectable barbiturates (sodium amytal or sodium pentothal) or with light inhalations of nitrous oxide or somnoform, the subject pours out his pent-up emotions without much prodding by the interrogator." d

45. It has been shown that the Central Investigation Agency (CIA) in USA had conducted research on the use of sodium pentothal for aiding interrogations in intelligence and counter-terrorism operations as early as the 1950's [see "Project MKULTRA—The CIA's Program of Research in Behavioral Modification", on file with *Schaffer Library of Drug Policy*¹⁴]. e

46. In recent years, the debate over the use of "truth serums" has been revived with demands for their use on persons suspected of involvement in terrorist activities. Coming to the test procedure, when the drug (sodium pentothal) is administered intravenously, the subject ordinarily descends into anaesthesia in four stages, namely: f

- (i) Awake stage
- (ii) Hypnotic stage
- (iii) Sedative stage

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¹⁴ Text available from <www.druglibrary.org>

(iv) Anaesthetic stage

47. A relatively lighter dose of sodium pentothal is injected to induce the "hypnotic stage" and the questioning is conducted during the same. The hypnotic stage is maintained for the required period by controlling the rate of administration of the drug. As per the materials submitted before us, the behaviour exhibited by the subject during this stage has certain specific characteristics, namely:
- a "hypnotic stage" and the questioning is conducted during the same. The hypnotic stage is maintained for the required period by controlling the rate of administration of the drug. As per the materials submitted before us, the behaviour exhibited by the subject during this stage has certain specific characteristics, namely:
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 - It facilitates handling of negative emotional responses (i.e. guilt, avoidance, aggression, frustration, non-responsiveness, etc.) in a positive manner.
 - It helps in rapid exploration and identification of underlying conflicts in the subject's mind and unresolved feelings about past events.
 - c
 - It induces the subject to divulge information which would usually not be revealed in conscious awareness and it is difficult for the person to lie at this stage.
 - The reversal from this stage occurs immediately when the administration of the drug is discontinued.

[Refer *Laboratory Procedure Manual—Forensic Narco-Analysis* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi, 2005); also see John M. MacDonald, "Truth Serum"¹⁵.]

48. The personnel involved in conducting a "narcoanalysis" interview include a forensic psychologist, an anaesthesiologist, a psychiatrist, a general physician or other medical staff and a language interpreter if needed. Additionally a videographer is required to create video recordings of the test for subsequent scrutiny. In India, this technique has been administered either inside forensic science laboratories or in the operation theatres of recognised hospitals. While a psychiatrist and general physician perform the preliminary function of gauging whether the subject is mentally and physically fit to undergo the test, the anaesthesiologist supervises the intravenous administration of the drug. It is the forensic psychologist who actually conducts the questioning. Since the tests are meant to aid investigation efforts, the forensic psychologist needs to closely cooperate with the investigators in order to frame appropriate questions.

49. This technique can serve several ends. The revelations could help investigators to uncover vital evidence or to corroborate pre-existing testimonies and prosecution theories. Narcoanalysis tests have also been used to detect "malinger" (faking of amnesia). The premise is that during the "hypnotic stage" the subject is unable to wilfully suppress the memories associated with the relevant facts. Thus, it has been urged that drug-induced revelations can help to narrow down investigation efforts thereby saving public resources. There is of course a very real possibility that information

¹⁵ 46(2) *The Journal of Criminal Law, Criminology and Police Science* 259-263 (July-August 1955)

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extracted through such interviews can lead to the uncovering of independent evidence which may be relevant. Hence, we must consider the implications of such derivative use of the drug-induced revelations, even if such revelations are not admissible as evidence. We must also account for the uses of this technique by persons other than investigators and prosecutors. Narcoanalysis tests could be requested by the defendants who want to prove their innocence. Demands for this test could also be made for purposes such as gauging the credibility of testimony, to refresh the memory of witnesses or to ascertain the mental capacity of persons to stand trial. Such uses can have a direct impact on the efficiency of investigations as well as the fairness of criminal trials. [See generally George H. Dession, Lawrence Z. Freedman, Richard C. Donnelly and Frederick G. Rexlich, "Drug-Induced Revelation and Criminal Investigation"¹⁶.]

50. It is also important to be aware of the limitations of the "narcoanalysis" technique. It does not have an absolute success rate and there is always the possibility that the subject will not reveal any relevant information. Some studies have shown that most of the drug-induced revelations are not related to the relevant facts and they are more likely to be in the nature of inconsequential information about the subjects' personal lives. It takes great skill on part of the interrogators to extract and identify information which could eventually prove to be useful. While some persons are able to retain their ability to deceive even in the hypnotic state, others can become extremely suggestible to questioning. This is especially worrying, since investigators who are under pressure to deliver results could frame questions in a manner that prompts incriminatory responses. Subjects could also concoct fanciful stories in the course of the "hypnotic stage". Since the responses of different individuals are bound to vary, there is no uniform criteria for evaluating the efficacy of the "narcoanalysis" technique.

51. In an article¹³ published in 1951, C.W. Muehlberger had described a French case which attracted controversy in 1948. Raymond Cens, who had been accused of being a Nazi collaborator, appeared to have suffered an apoplectic stroke which also caused memory loss. The French Court trying the case had authorised a Board of Psychiatrists to conduct an examination for ascertaining the defendant's amnesia. The narcoanalysis technique was used in the course of the examination and the defendant did not object to the same. However, the test results showed that the subject's memory was not impaired and that he had been faking amnesia. At the trial, testimony about these findings was admitted, thereby leading to a conviction. Subsequently, Raymond Cens filed a civil suit against the psychiatrists alleging assault and illegal search. However, it was decided that the Board had used routine psychiatric procedures and since the actual physical damage to the defendant was nominal, the psychiatrists were acquitted. At the time, this case created

¹⁶ 62 Yale Law Journal 315-347 (February 1953)

¹³ 42(4) The Journal of Criminal Law, Criminology and Police Science 513-528 (November-December 1951)

quite a stir and the Council of the Paris Bar Association had passed a resolution against the use of drugs during interrogation. [Refer C.W. Muchlberger (1951) at p. 527; *Raymond Cens case* has also been discussed in the following article: J.P. Gagnieur, "The Judicial Use of Psychonarcosis in France"¹⁷.]

52. An article published in 1961 [Andre A. Moenssens, "Narcoanalysis in Law Enforcement"¹⁸] had surveyed some judicial precedents from USA which dealt with the forensic uses of the narcoanalysis technique. The first reference is to a decision from the State of Missouri reported as *State v. Hudson*¹⁹. In that case, the defence lawyer in a prosecution for rape attempted to rely on the expert testimony of a doctor. The doctor in turn declared that he had questioned the defendant after injecting a truth serum and the defendant had denied his guilt while in a drug-induced state. The trial court had refused to admit the doctor's testimony by finding it to be completely unreliable from a scientific viewpoint. The appellate court upheld the finding and made the following observation, *ibid.* at p. 602:

"Testimony of this character—barring the sufficient fact that it cannot be classified otherwise than a self-serving declaration—is, in the present state of human knowledge, unworthy of serious consideration. We are not told from what well this serum is drawn or in what alembic its alleged truth compelling powers are distilled. Its origin is as nebulous as its effect is uncertain. ..."

53. In *State v. Lindemuth*²⁰, the testimony of a psychiatrist was not admitted when he wanted to show that the answers given by a defendant while under the influence of sodium pentothal supported the defendant's plea of innocence in a murder case. The trial court's refusal to admit such testimony was endorsed by the appellate court, and it was noted, *ibid.* at p. 243:

"Until the use of the drug as a means of procuring the truth from people under its influence is accorded general scientific recognition, we are unwilling to enlarge the already immense field where medical experts, apparently equally qualified, express such diametrically opposed views on the same facts and conditions, to the despair of the court reporter and the bewilderment of the fact-finder."

54. However, Andre Moenssens (1961) also took note of a case which appeared to endorse an opposing view. In *People v. Jones*²¹, the trial court overruled the prosecution's objection to the introduction of a psychiatrist's testimony on behalf of the defendant. The psychiatrist had conducted several tests on the defendant which included a sodium pentothal induced interview.

17 -10(3) *Journal of Criminal Law and Criminology* 370-380 (September-October 1949)

18 52(4) *The Journal of Criminal Law, Criminology and Police Science* 453-458 (November-December 1961)

19 314 Mo 599 (1926)

20 56 NM 237 (1952)

21 42 Cal 2d 219 (1954)

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The court found that this was not sufficient to exclude the psychiatrist's testimony in its entirety. It was observed that even though the truth of statements revealed under narcoanalysis remains uncertain, the results of the same could be clearly distinguished from the psychiatrist's overall conclusions which were based on the results of all the tests considered together.

55. At the Federal level, the US Court of Appeals for the Ninth Circuit dealt with a similar issue in *Lindsey v. United States*²². In that case, the trial court had admitted a psychiatrist's opinion testimony which was based on a clinical examination that included psychological tests and a sodium pentothal induced interview. The subject of the interview was a fifteen-year-old girl who had been sexually assaulted and had subsequently testified in a prosecution for rape. On cross-examination, the credibility of the victim's testimony had been doubted and in an attempt to rebut the same, the prosecution had called on the psychiatrist. On the basis of the results of the clinical examination, the psychiatrist offered his professional opinion that the victim had been telling the truth when she had repeated the charges that were previously made to the police. This testimony was admitted as a prior consistent statement to rehabilitate the witness but not considered as substantive evidence. Furthermore, a tape recording of the psychiatrist's interview with the girl, while she was under narcosis, was also considered as evidence. The jury went on to record a finding of guilt. When the case was brought in appeal before the Ninth Circuit Court, the conviction was reversed on the ground that the defendant had been denied the "due process of law". It was held that before a prior consistent statement made under the influence of a sodium pentothal injection could be admitted as evidence, it should be scientifically established that the test is absolutely accurate and reliable in all cases. Although the value of the test in psychiatric examinations was recognised, it was pointed out that the reliability of sodium pentothal tests had not been sufficiently established to warrant admission of its results in evidence. It was stated that "Scientific tests reveal that people thus prompted to speak freely do not always tell the truth." [Cited from *Andre A. Moenssens*¹⁸ (1961) at pp. 455-56.]

56. In *Lawrence M. Dugan v. Commonwealth of Kentucky*²³ the defendant had been given a truth serum test by a psychiatrist employed by him. The trial court refused to admit the psychiatrist's testimony which supported the truthfulness of the defendant's statement. The defendant had pleaded innocence by saying that a shooting which had resulted in the death of another person had been an accident. The trial court's decision was affirmed on appeal and it was reasoned that no court of last resort has recognised the admissibility of the results of truth serum tests, the principal ground being that such tests have not attained sufficient recognition of dependability and reliability.

²² 237 F.2d 893 (9th Cir 1956)

¹⁸ 52(4) *The Journal of Criminal Law, Criminology and Police Science* 453-458 (November-December 1961)

²³ 333 SW 2d 755 (1960)

57. The US Supreme Court has also disapproved of the forensic uses of truth inducing drugs in *Townsend v. Sain*²⁴. In that case a heroin addict was arrested on the suspicion of having committed robbery and murder. While in custody he began to show severe withdrawal symptoms, following which the police officials obtained the services of a physician. In order to treat these withdrawal symptoms, the physician injected a combined dosage of 1/8 grain of phenobarbital and 1/230 grain of hyoscine. Hyoscine is same as "scopolamine" which has been described earlier. This dosage appeared to have a calming effect on Townsend and after the physician's departure he promptly responded to questioning by the police and eventually made some confessional statements. The petitioner's statements were duly recorded by a court reporter. The next day he was taken to the office of the prosecutor where he signed the transcriptions of the statements made by him on the previous day. [The facts of this case have also been discussed in Charles E. Sheedy, "Narcointerrogation of a Criminal Suspect"²⁵, *The Journal of Criminal Law, Criminology and Police Science* at pp. 118-19.]

58. When the case came up for trial, the counsel for the petitioner in *Townsend case*²⁴ brought a motion to exclude the transcripts of the statements from the evidence. However, the trial Judge denied this motion and admitted the court reporter's transcription of the confessional statements into evidence. Subsequently, a jury found Townsend to be guilty thereby leading to his conviction. When the petitioner made a habeas corpus application before a Federal District Court, one of the main arguments advanced was that the fact of scopolamine's character as a truth serum had not been brought out at the time of the motion to suppress the statements or even at the trial before the State Court. The Federal District Court denied the habeas corpus petition without a plenary evidentiary hearing, and this decision was affirmed by the Court of Appeals. Hence, the matter came before the US Supreme Court.

59. In an opinion authored by Earl Warren, C.J. the Supreme Court held that the Federal District Court had erred in denying a writ of habeas corpus without giving a plenary evidentiary hearing to examine the voluntariness of the confessional statements. Both the majority opinion as well as the dissenting opinion (Stewart, J.) concurred on the finding that a confession induced by the administration of drugs is constitutionally inadmissible in a criminal trial. On this issue, Warren, C.J. observed at US pp. 307-09: (*Townsend case*²⁴, I. Ed pp. 782-83)

- "Numerous decisions of this Court have established the standards governing the admissibility of confessions into evidence. If an individual's 'will was overborne' or if his confession was not 'the product of a rational intellect and a free will', his confession is inadmissible because coerced. These standards are applicable whether a confession is the product of physical intimidation or psychological

²⁴ 91. Fd 2d 770 : 372 US 293 (1962)

²⁵ 50(2) *The Journal of Criminal Law, Criminology and Police Science* 118-123 (July-August 1959)

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pressure and, of course, are equally applicable to a drug-induced statement. It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a 'truth serum'. It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a 'truth serum', if these properties exist. Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible."

(internal citations omitted) (emphasis in original)

60. In *United States v. Swanson*²⁶, two individuals had been convicted for conspiracy and extortion through the acts of sending threatening letters. At the trial stage, one of the defendants testified that he suffered from amnesia and therefore he could not recall his alleged acts of telephoning the co-defendant and mailing threatening letters. In order to prove such amnesia his counsel sought the admission of a taped interview between the defendant and a psychiatrist which had been conducted while the defendant was under the influence of sodium amytal. The drug-induced statements supposedly showed that the scheme was a joke or a prank. The trial court refused to admit the contents of this sodium amytal induced interview and the 11th Circuit Court upheld this decision. In holding the same, it was also observed, *ibid.* at p. 528:

"... Moreover, no drug-induced recall of past events which the subject is otherwise unable to recall is any more reliable than the procedure for inducing recall. Here both psychiatrists testified that sodium amytal does not ensure truthful statements. No recreation or recall, by photograph, demonstration, drug-stimulated recall, or otherwise, would be admissible with so tenuous a predicate."

61. A decision given by the Ninth Circuit Court in *United States v. Solomon*²⁷, has been cited by the respondents to support the forensic uses of the narcoanalysis technique. However, a perusal of that judgment shows that neither the actual statements made during narcoanalysis interviews nor the expert testimony relating to the same were given any weightage. The facts were that three individuals, namely, Solomon, Wesley and George (a minor at the time of the crime) were accused of having committed robbery and murder by arson. After their arrest, they had changed their statements about the events relating to the alleged offences. Subsequently, Wesley gave his consent for a sodium amytal induced interview and the same was administered by a psychiatrist named Dr. Montgomery. The same psychiatrist also conducted a sodium amytal interview with George at the request of the investigators. At the trial stage, George gave testimony which proved to be incriminatory for Solomon and Wesley. However, the statements made by Wesley during the narcoanalysis interview were not admitted as evidence and even the expert testimony about the same was excluded.

²⁶ 572 F.2d 523 (5th Cir 1978)

²⁷ 753 F.2d 1522 (9th Cir 1985)

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62. On appeal, the Ninth Circuit Court held that there had been no abuse of discretion by the trial court in considering the evidence before it. Solomon and Wesley had contended that the trial court should have excluded the testimony given by George before the trial Judge since the same was based on the results of the sodium amytal interview and was hence unreliable. The court drew a distinction between the statements made during the narcoanalysis interview and the subsequent statements made before the trial court. It was observed that it was open to the defendants to show that George's testimony during trial had been bolstered by the previous revelations made during the narcoanalysis interview. However, the connection between the drug-induced revelations and the testimony given before the trial court could not be presumed. It was further noted, *ibid.* at p. 1525: (*Solomon case*²⁷)

- "The only Ninth Circuit case addressing narcoanalysis excluded a recording of and psychiatric testimony supporting an interview conducted under the influence of sodium pentothal, a precursor of sodium amytal. [*Lindsey v. United States*²².]

- The case at Bar is distinguishable because no testimony concerning the narcoanalysis was offered at trial. Only George's current recollection of events was presented.

- In an analogous situation, this circuit has held that the current recollections of witnesses whose memories have been refreshed by hypnosis are admissible, with the fact of hypnosis relevant to credibility only [*United States v. Adams*²⁸, 1st 2d at pp. 198-99.], *cert. denied*. We have cautioned, however, that 'great care must be exercised to insure' that statements after hypnosis are not the product of hypnotic suggestion. *Id.*

- We find no abuse of discretion in the trial court's ruling to admit the testimony of the witness George. The court's order denying Solomon's Motion to Suppress reflects a careful balancing of reliability against prejudicial dangers."

63. However, Wesley wanted to introduce expert testimony by Dr. Montgomery which would explain the effects of sodium amytal as well as the statements made during his own drug-induced interview. The intent was to rehabilitate Wesley's credibility after the prosecution had impeached it with an earlier confession. The trial court had held that even though narcoanalysis was not reliable enough to admit into evidence, Dr. Montgomery could testify about the statements made to him by Wesley, however, without an explanation of the circumstances. On this issue, the Ninth Circuit Court referred to the *Frye*³ standard for the admissibility of scientific evidence. It was also noted that the trial court had the discretion to draw the necessary balance between the probative value of the evidence and its prejudicial effect.

²⁷ *United States v. Solomon*, 753 F.2d 1522 (9th Cir 1985)

²² 237 F.2d 893 (9th Cir 1956)

²⁸ 581 F.2d 193 (9th Cir 1978)

³ *Frye v. United States*, 54 App DC 46 (1923)

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It again took note of the decision in *Lindsey v. United States*²² where the admission of a tape recording of a narcoanalysis interview along with an expert's explanation of the technique was held to be a prejudicial error. The following conclusion was stated: (1st 2d p. 1526) a

"Dr. Montgomery testified also that narcoanalysis is useful as a source of information that can be valuable if verified through other sources. At one point he testified that it would elicit an accurate statement of subjective memory, but later said that the subject could fabricate memories. He refused to agree that the subject would be more likely to tell the truth under narcoanalysis than if not so treated. b

Wesley wanted to use the psychiatric testimony to bolster the credibility of his trial testimony that George started the fatal fire. Wesley's statement shortly after the fire was that he himself set the fire. The probative value of the statement while under narcoanalysis that George was responsible, was the drug's tendency to induce truthful statements. c

Montgomery admitted that narcoanalysis does not reliably induce truthful statements. The judge's exclusion of the evidence concerning narcoanalysis was not an abuse of discretion. The prejudicial effect of an aura of scientific respectability outweighed the slight probative value of the evidence." d

64. In *State of New Jersey v. Daryll Pitts*²⁹, the trial court had refused to admit a part of a psychiatrist's testimony which was based on the results of the defendant's sodium amytal induced interview. The defendant had been charged with murder and had sought reliance on the testimony to show his unstable state of mind at the time of the homicides. Reliance on the psychiatrist's testimony was requested during the sentencing phase of the trial in order to show a mitigating factor. On appeal, the Supreme Court of New Jersey upheld the trial court's decision to exclude that part of the testimony which was derived from the results of the sodium amytal interview. e

65. Reference was made to the *Frye*³ standard while observing that "in determining the admissibility of evidence derived from scientific procedures, a court must first ascertain the extent to which the reliability of such procedures has attained general acceptance within the relevant scientific community." (*ibid.* at p. 1344) f

Furthermore, the expert witnesses who had appeared at the trial had given conflicting accounts about the utility of a sodium amytal induced interview for ascertaining the mental state of a subject with regard to past events. It was stated, *ibid.* at p. 1348: g

"On the two occasions that this Court has considered the questions, we have concluded, based on the then existing state of scientific

22 237 F.2d 893 (9th Cir 1956)

29 56 A.2d 1320 (NJ 1989)

3 *Frye v. United States*, 54 App DC 46 (1923)

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a knowledge, that testimony derived from a sodium amytal induced interview is inadmissible to prove the truth of the facts asserted. [See *State v. Levitt*³⁰, NJ at p. 275; *State v. Sinnott*³¹.] Our rule is consistent with the views expressed by other courts that have addressed the issue.

b "...The expert testimony adduced at the Rule 8 hearing indicated that the scientific community continues to view testimony induced by sodium amytal as unreliable to ascertain truth. Thus, the trial court's ruling excluding Dr. Sadoff's testimony in the guilt phase was consistent with our precedents, with the weight of authority throughout the country, and also with contemporary scientific knowledge as reflected by the expert testimony. ..."

(internal citations omitted)

c 66. Since a person subjected to the narcoanalysis technique is in a half-conscious state and loses awareness of time and place, this condition can be compared to that of a person who is in a hypnotic state. In *Horvath v. R.*³² the Supreme Court of Canada held that statements made in a hypnotic state were not voluntary and hence they cannot be admitted as evidence. It was also decided that if the post-hypnotic statements relate back to the contents of what was said during the hypnotic state, the subsequent statements would be inadmissible. In that case a 17-year-old boy suspected for the murder of his mother had been questioned by a police officer who had training in the use of hypnotic methods. During the deliberate interruptions in the interrogation sessions, the boy had fallen into a mild hypnotic state and had eventually confessed to the commission of the murder. He later repeated the admissions before the investigating officers and signed a confessional statement. The trial Judge had found all of these statements to be inadmissible, thereby leading to an acquittal. The Court of Appeal had reversed this decision, and hence an appeal was made before the Supreme Court. Notably, the appellant had refused to undergo a narcoanalysis interview or a polygraph test. It was also evident that he had not consented to the hypnosis. The multiple opinions delivered in the case examined the criterion for deciding the voluntariness of a statement. Reference was made to the well-known statement of Lord Sumner in *Ibrahim v. R.*³³, at AC p. 609:

f "It has long been established as a positive rule of English criminal law, that no statement made by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

g 67. In *Horvath v. R.*³² the question was whether statements made under a hypnotic state could be equated with those obtained by "fear of prejudice" or "hope of advantage". The Court ruled that the inquiry into the voluntariness of a statement should not be literally confined to these expressions. After

30 36 NJ 266 (1961)

h 31 132 A 2d 298 (1957)

32 (1979) 41 CCC 2d 385 : (1979) 2 SCR 376 (Can SC)

33 1914 AC 599 : (1914-15) All ER Rep 874 (PC)

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examining several precedents, Spence, J. held that the total circumstances surrounding the interrogation should be considered, with no particular emphasis placed on the hypnosis. It was observed that in this particular case the interrogation of the accused had resulted in his complete emotional disintegration, and hence the statements given were inadmissible. It was also held that the rule in *Ibrahim v. R.*³³ that a statement must be induced by "fear of prejudice" or "hope of advantage" in order to be considered involuntary was not a comprehensive test. The word "voluntary" should be given its ordinary and natural meaning so that the circumstances which existed in the present case could also be described as those which resulted in involuntary statements.

68. In a concurring opinion Beetz, J. drew a comparison between statements made during hypnosis and those made under the influence of a sodium amytal injection. It was observed at para 91:

"91. Finally, voluntariness is incompatible not only with promises and threats but actual violence. Ifad Horvath made a statement while under the influence of an amytal injection administered without his consent, the statement would have been inadmissible because of the assault, and presumably because also of the effect of the injection on his mind. There was no physical violence in the case at bar. There is not even any evidence of bodily contact between Horvath and Sergeant Proke, but through the use of an interrogation technique involving certain physical elements such as a hypnotic quality of voice and manner, a police officer has gained unconsented access to what in a human being is of the utmost privacy, the privacy of his own mind. As I have already indicated, it is my view that this was a form of violence or intrusion of a moral or mental nature, more subtle than visible violence but not less efficient in the result than an amytal injection administered by force."

69. In this regard, the following observations are instructive for deciding the questions before us at paras 117, 118:

"117. It would appear that hypnosis and narcoanalysis are used on a consensual basis by certain police forces as well as by the defence, and it has been argued that they can serve useful purposes.

118. I refrain from commenting on such practices, short of noting that even the consensual use of hypnosis and narcoanalysis for evidentiary purposes may present problems. Under normal police interrogation, a suspect has the opportunity to renew or deny his consent to answer each question, which is no longer the case once he is, although by consent, in a state of hypnosis or under the influence of a 'truth serum'."

(internal citation omitted)

70. Our attention has also been drawn to the decision reported as *Rock v. Arkansas*³⁴ in which the US Supreme Court ruled that hypnotically refreshed testimony could be admitted as evidence. The constitutional basis for

33 1914 AC 599; (1914-15) All ER Rep 874 (PC)

34 97 L Ed 2d 37; 483 US 41 (1987)

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- a admitting such testimony was the Sixth Amendment which gives every person a right to present a defence in criminal cases. However, the crucial aspect was that the trial court had admitted the oral testimony given during the trial stage rather than the actual statements made during the hypnosis session conducted earlier during the investigation stage. It was found that such hypnotically refreshed testimony was the only defence available to the defendant in the circumstances. In such circumstances, it would of course be open to the prosecution to contest the reliability of the testimony given during the trial stage by showing that it had been bolstered by the statements made during hypnosis.

- b 71. It may be recalled that a similar line of reasoning had been adopted in *United States v. Solomon*²⁷, where for the purpose of admissibility of testimony, a distinction had been drawn between the statements made during a narcoanalysis interview and the oral testimony given during the trial stage which was allegedly based on the drug-induced statements. Hence, the weight of precedents indicates that both the statements made during narcoanalysis interviews as well as expert testimony relating to the same have not been given weightage in criminal trials.

Brain Electrical Activation Profile (BEAP) test

- d 72. The third technique in question is the "Brain Electrical Activation Profile test", also known as the "P300 waves test". It is a process of detecting whether an individual is familiar with certain information by way of measuring activity in the brain that is triggered by exposure to selected stimuli. This test consists of examining and measuring "event-related potentials" (ERP) i.e. electrical wave forms emitted by the brain after it has absorbed an external event. An ERP measurement is the recognition of specific patterns of electrical brain activity in a subject that are indicative of certain cognitive mental activities that occur when a person is exposed to a stimulus in the form of an image or a concept expressed in words. The measurement of the cognitive brain activity allows the examiner to ascertain whether the subject recognised stimuli to which he/she was exposed. [Cited from Andre A. Moenssens, "Brain Fingerprinting—Can it be Used to Detect the Innocence of Persons Charged with a Crime?"³⁵, *University of Missouri at Kansas City Law Review* at p. 893.]

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g 73. By the late 19th century it had been established that the brain functioned by emitting electrical impulses and the technology to measure them was developed in the form of the electroencephalograph (EEG) which is now commonly used in the medical field. Brain wave patterns observed through an EEG scan are fairly crude and may reflect a variety of unrelated brain activity functions. It was only with the development of computers that it became possible to sort out specific wave components on an EEG and identify the correlation between the waves and specific stimuli. The P300 wave is one such component that was discovered by Dr. Samuel Sutton in

h
27 753 F.2d 1522 (9th Cir 1985)

35 70 *University of Missouri at Kansas City Law Review* 891-920 (Summer 2002)

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1965. It is a specific event-related brain potential (ERP) which is triggered when information relating to a specific event is recognised by the brain as being significant or surprising.

74. The P300 waves test is conducted by attaching electrodes to the scalp of the subject, which measure the emission of the said wave components. The test needs to be conducted in an insulated and air-conditioned room in order to prevent distortions arising out of weather conditions. Much like the narcoanalysis technique and polygraph examination, this test also requires effective collaboration between the investigators and the examiner, most importantly for designing the stimuli which are called "probes". Ascertaining the subject's familiarity with the "probes" can help in detecting deception or to gather useful information. The test subject is exposed to auditory or visual stimuli (words, sounds, pictures, videos) that are relevant to the facts being investigated alongside other irrelevant words and pictures. Such stimuli can be broadly classified as "material probes" and "neutral probes". The underlying theory is that in the case of guilty suspects, the exposure to the material probes will lead to the emission of P300 wave components which will be duly recorded by the instruments. By examining the records of these wave components the examiner can make inferences about the individual's familiarity with the information related to the crime. [Refer *Laboratory Procedure Manual—Brain Electrical Activation Profile* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi, 2005).]

75. The P300 waves test was the precursor to other neuroscientific techniques such as "brain fingerprinting" developed by Dr. Lawrence Farwell. The latter technique has been promoted in the context of criminal justice and has already been the subject of litigation. There is an important difference between the "P300 waves test" that has been used by the forensic science laboratories in India and the "brain fingerprinting" technique. Dr. Lawrence Farwell has argued that the P300 wave component is not an isolated sensory brain effect but it is part of a longer response that continues to take place after the initial P300 stimulus has occurred. This extended response bears a correlation with the cognitive processing that takes place slightly beyond the P300 wave and continues in the range of 300-800 milliseconds after the exposure to the stimulus. This extended brain wave component has been named as the MERMER (Memory and encoding related multifaceted electroencephalographic response) effect. [See generally Lawrence A. Farwell, *Brain Fingerprinting: A New Paradigm in Criminal Investigations and Counter-Terrorism* (2001).³⁶]

76. The functional magnetic resonance imaging (fMRI) is another neuroscientific technique whose application in the forensic setting has been contentious. It involves the use of MRI scans for measuring blood flow between different parts of the brain which bears a correlation to the subject's truthfulness or deception. fMRI-based lie detection has also been advocated

³⁶ Text can be downloaded from <www.brainwavescience.com>

- as an aid to interrogations in the context of counter-terrorism and intelligence operations, but it prompts the same legal questions that can be raised with respect to all of the techniques mentioned above. Even though these are non-invasive techniques the concern is not so much with the manner in which they are conducted but the consequences for the individuals who undergo the same. The use of techniques such as "brain fingerprinting" and "fMRI-based lie detection" raise numerous concerns such as those of protecting mental privacy and the harms that may arise from inferences made about the subject's truthfulness or familiarity with the facts of a crime. [See generally Michael S. Pardo, "Neuroscience Evidence, Legal Culture and Criminal Procedure"³⁷; Sarah E. Stoller and Paul Root Wolpe, "Emerging Neurotechnologies for Lie Detection and the Fifth Amendment"³⁸.]

77. These neuroscientific techniques could also find application outside the criminal justice setting. For instance, Henry T. Greely (2005, cited below) has argued that technologies that may enable a precise identification of the subject's mental responses to specific stimuli could potentially be used for market research by business concerns for surveying customer preferences and developing targeted advertising schemes. They could also be used to judge mental skills in the educational and employment related settings since cognitive responses are often perceived to be linked to academic and professional competence. One can foresee the potential use of this technique to distinguish between students and employees on the basis of their cognitive responses. There are several other concerns with the development of these "mind-reading" technologies especially those relating to the privacy of individuals. [Refer Henry T. Greely, "Chapter 17: The Social Effects of Advances in Neuroscience: Legal Problems, Legal Perspectives" in Judy Illes (ed.), *Neuroethics—Defining the Issues in Theory, Practice and Policy* (Oxford University Press, 2005) at pp. 245-63.]

78. Even though the P300 wave component has been the subject of considerable research, its uses in the criminal justice system have not received much scholarly attention. Dr. Lawrence Farwell "brain fingerprinting"³⁶ technique has attracted considerable publicity but has not been the subject of any rigorous independent study. Besides this preliminary doubt, an important objection is centred on the inherent difficulty of designing the appropriate "probes" for the test. Even if the "probes" are prepared by an examiner who is thoroughly familiar with all aspects of the facts being investigated, there is always a chance that a subject may have had prior exposure to the material probes. In case of such prior exposure, even if the subject is found to be familiar with the probes, the same will be meaningless in the overall context of the investigation. For example, in the aftermath of crimes that receive considerable media attention the subject can be exposed to the test stimuli in many ways. Such exposure could occur by way of reading about the crime in newspapers or magazines, watching television, listening to the radio or by word of mouth. A possibility of prior

h 37 33 American Journal of Criminal Law 301-337 (Summer 2006)
38 33 American Journal of Law and Medicine 359-375 (2007)
36 Text can be downloaded from <www.brainwavescience.com>

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exposure to the stimuli may also arise if the investigators unintentionally reveal crucial facts about the crime to the subject before conducting the test. The subject could also be familiar with the content of the material probes for several other reasons. a

79. Another significant limitation is that even if the tests demonstrate familiarity with the material probes, there is no conclusive guidance about the actual nature of the subject's involvement in the crime being investigated. For instance a bystander who witnessed a murder or robbery could potentially be implicated as an accused if the test reveals that the said person was familiar with the information related to the same. Furthermore, in cases of amnesia or "memory-hardening" on part of the subject, the tests could be blatantly misleading. Even if the inferences drawn from the "P300 waves test" are used for corroborating other evidence, they could have a material bearing on a finding of guilt or innocence despite being based on an uncertain premise. [For an overview of the limitations of these neuroscientific techniques, see John G. New, "If You Could Read My Mind—Implications of Neurological Evidence for Twenty-First Century Criminal Jurisprudence"³⁹.] b

80. We have come across two precedents relatable to the use of "brain fingerprinting" tests in criminal cases. Since this technique is considered to be an advanced version of the P300 waves test, it will be instructive to examine these precedents. c

81. In *Harrington v. State*⁴⁰, Terry, J. Harrington (appellant) had been convicted for murder in 1978 and the same had allegedly been committed in the course of an attempted robbery. A crucial component of the incriminating materials was the testimony of his accomplice. However, many years later it emerged that the accomplice's testimony was prompted by an offer of leniency from the investigating police and doubts were raised about the credibility of other witnesses as well. Subsequently it was learnt that at the time of the trial, the police had not shared with the defence some investigative reports that indicated the possible involvement of another individual in the said crime. Harrington had also undergone a "brain fingerprinting" test under the supervision of Dr. Lawrence Farwell. The test results showed that he had no memories of the "probes" relating to the act of murder. Hence, Harrington approached the District Court seeking the vacation of his conviction and an order for a new trial. The post-conviction relief was sought on the grounds of newly discovered evidence which included recantation by the prosecution's primary witness, the past suppression of police investigative reports which implicated another suspect and the results of the "brain fingerprinting" tests. However, the District Court denied this application for post-conviction relief. This was followed by an appeal before the Supreme Court of Iowa. d

³⁹ 29 Journal of Legal Medicine 179-197 (April-June 2008)
⁴⁰ 659 NW 2d 509 (2003) (Iowa SC)

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82. The appellate court in *Harrington v. State*⁴⁰ concluded that Harrington's appeal was timely and his action was not time-barred. The appellant was granted relief in light of a "due process" violation i.e. the failure on part of the prosecution at the time of the original trial to share the investigative reports with the defence. It was observed that the defendant's right to a fair trial had been violated because the prosecution had suppressed evidence which was favourable to the defendant and clearly material to the issue of guilt. Hence the case was remanded back to the District Court.
- However, the Supreme Court of Iowa gave no weightage to the results of the "brain fingerprinting" test and did not even inquire into their relevance or reliability. In fact it was stated:

"Because the scientific testing evidence is not necessary to a resolution of this appeal, we give it no further consideration." [NW 2d at p. 516]

83. The second decision brought to our attention is *Slaughter v. Oklahoma*⁴¹. In that case, Jimmy Ray Slaughter had been convicted for two murders and sentenced to death. Subsequently, he filed an application for post-conviction relief before the Court of Criminal Appeals of Oklahoma which attempted to introduce in evidence an affidavit and evidentiary materials relating to a "brain fingerprinting" test. This test had been conducted by Dr. Lawrence Farwell whose opinion was that the petitioner did not have knowledge of the "salient features of the crime scene". Slaughter also sought a review of the evidence gathered through DNA testing and challenged the bullet composition analysis pertaining to the crime scene. However, the appellate court denied the application for post-conviction relief as well as the motion for an evidentiary hearing. With regard to the affidavits based on the "brain fingerprinting" test, it was held, *ibid.* at p. 834:

"10. Dr. Farwell makes certain claims about the brain fingerprinting test that are not supported by anything other than his bare affidavit. He claims the technique has been extensively tested, has been presented and analyzed in numerous peer review articles in recognized scientific publications, has a very low rate of error, has objective standards to control its operation, and is generally accepted within the 'relevant scientific community'. These bare claims, however, without any form of corroboration, are unconvincing and, more importantly, legally insufficient to establish the petitioner's post-conviction request for relief. The petitioner cites one published opinion, *Harrington v. State*⁴⁰, in which a brain fingerprinting test result was raised as error and discussed by the Iowa Supreme Court ('a novel computer-based brain testing'). However, while the lower court in Iowa appears to have admitted the evidence under non-*Daubert*⁴¹ circumstances, the test did not ultimately factor into the Iowa Supreme Court's published decision in any way."

⁴⁰ 659 NW 2d 509 (2003) (Iowa SC)

⁴¹ 105 P 3d 832 (2005)

⁴¹ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 1. Ed 2d 469 : 509 US 579 (1993)

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Accordingly, the following conclusion was stated, *ibid.* at p. 836:

"18. Therefore, based upon the evidence presented, we find the brain fingerprinting evidence is procedurally barred under the Act and our prior cases, as it could have been raised in the petitioner's direct appeal and, indeed, in his first application for post-conviction relief. We further find a lack of sufficient evidence that would support a conclusion that the petitioner is factually innocent or that brain fingerprinting, based solely upon the MERMER effect, would survive a *Daubert*⁴ analysis."

Contentious issues in the present case

84. As per the Laboratory Procedure Manuals, the impugned tests are being conducted at the direction of the jurisdictional courts even without obtaining the consent of the intended test subjects. In most cases these tests are conducted conjunctively wherein the veracity of the information revealed through narcoanalysis is subsequently tested through a polygraph examination or the BEAP test. In some cases the investigators could first want to ascertain the capacity of the subject to deceive (through polygraph examination) or his/her familiarity with the relevant facts (through BEAP test) before conducting a narcoanalysis interview. Irrespective of the sequence in which these techniques are administered, we have to decide on their permissibility in circumstances where any of these tests are compulsorily administered, either independently or conjunctively.

85. It is plausible that investigators could obtain statements from individuals by threatening them with the possibility of administering either of these tests. The person being interrogated could possibly make self-incriminating statements on account of apprehensions that these techniques will extract the truth. Such behaviour on the part of the investigators is more likely to occur when the person being interrogated is unaware of his/her legal rights or is intimidated for any other reason. It is a settled principle that a statement obtained through coercion, threat or inducement is involuntary and hence inadmissible as evidence during trial. However, it is not settled whether a statement made on account of the apprehension of being forcibly subjected to the impugned tests will be involuntary and hence inadmissible. This aspect merits consideration. It is also conceivable that an individual who has undergone either of these tests would be more likely to make self-incriminating statements when he/she is later confronted with the results. The question in that regard is whether the statements that are made subsequently should be admissible as evidence. The answers to these questions rest on the permissibility of subjecting individuals to these tests without their consent.

I. Whether the involuntary administration of the impugned techniques violates the "right against self-incrimination" enumerated in Article 20(3) of the Constitution?

86. The investigators could seek reliance on the impugned tests to extract information from a person who is suspected or accused of having committed

⁴ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 125 L. Ed 2d 469 : 509 US 579 (1993)

- a a crime. Alternatively, these tests could be conducted on witnesses to aid investigative efforts. As mentioned earlier, this could serve several objectives, namely, those of gathering clues which could lead to the discovery of relevant evidence, to assess the credibility of previous testimony or even to ascertain the mental state of an individual. With these uses in mind, we have to decide whether the compulsory administration of these tests violates the "right against self-incrimination" which finds place in Article 20(3) of the Constitution of India. Along with the "rule against double jeopardy" and the
- b "rule against retrospective criminalisation" enumerated in Article 20, it is one of the fundamental protections that controls interactions between individuals and the criminal justice system. Article 20(3) reads as follows:

"20. (3) No person accused of any offence shall be compelled to be a witness against himself."

- c 87. The interrelationship between the "right against self-incrimination" and the "right to fair trial" has been recognised in most jurisdictions as well as international human rights instruments. For example, the US Constitution incorporates the "privilege against self-incrimination" in the text of its Fifth Amendment. The meaning and scope of this privilege has been judicially moulded by recognising its interrelationship with other constitutional rights
- d such as the protection against "unreasonable search and seizure" (Fourth Amendment) and the guarantee of "due process of law" (Fourteenth Amendment). In the International Covenant on Civil and Political Rights, 1966, Article 14(3)(g) enumerates the minimum guarantees that are to be accorded during a trial and states that everyone has a right not to be compelled to testify against himself or to confess guilt. In the European
- e Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Article 6(1) states that every person charged with an offence has a right to a fair trial and Article 6(2) provides that "everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law". The guarantee of "presumption of innocence" bears a direct link to the
- f "right against self-incrimination" since compelling the accused person to testify would place the burden of proving innocence on the accused instead of requiring the prosecution to prove guilt.

88. In the Indian context, Article 20(3) should be construed with due regard for the interrelationship between rights, since this approach was recognised in *Maneka Gandhi case*⁴². Hence, we must examine the "right against self-incrimination" in respect of its relationship with the multiple
- g dimensions of "personal liberty" under Article 21, which include guarantees such as the "right to fair trial" and "substantive due process".

89. It must also be emphasised that Articles 20 and 21 have a non-derogable status within Part III of our Constitution because the Constitution (Forty-fourth Amendment) Act, 1978 mandated that the right
- h to move any court for the enforcement of these rights cannot be suspended

⁴² *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : AIR 1978 SC 597

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even during the operation of a Proclamation of Emergency. In this regard, Article 359(1) of the Constitution of India reads as follows:

"359. Suspension of the enforcement of the rights conferred by Part III during Emergencies.—(1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order."

90. Undoubtedly, Article 20(3) has an exalted status in our Constitution and questions about its meaning and scope deserve thorough scrutiny. In one of the impugned judgments, it was reasoned that all citizens have an obligation to cooperate with ongoing investigations. For instance reliance has been placed on Section 39 CrPC which places a duty on citizens to inform the nearest Magistrate or police officer if they are aware of the commission of, or of the intention of any other person to commit the crimes enumerated in the section. Attention has also been drawn to the language of Section 156(1) CrPC which states that a police officer in charge of a police station is empowered to investigate cognizable offences even without an order from the jurisdictional Magistrate. Likewise, our attention was drawn to Section 161(1) CrPC which empowers the police officer investigating a case to orally examine any person who is supposed to be acquainted with the facts and circumstances of the case. While the overall intent of these provisions is to ensure the citizens' cooperation during the course of investigation, they cannot override the constitutional protections given to the accused persons. The scheme of CrPC itself acknowledges this hierarchy between constitutional and statutory provisions in this regard. For instance, Section 161(2) CrPC prescribes that when a person is being examined by a police officer, he is not bound to answer such questions, the answers of which would have a tendency to expose him to a criminal charge or a penalty or forfeiture.

91. Not only does an accused person have the right to refuse to answer any question that may lead to incrimination, there is also a rule against adverse inferences being drawn from the fact of his/her silence. At the trial stage, Section 313(3) CrPC places a crucial limitation on the power of the court to put questions to the accused so that the latter may explain any circumstances appearing in the evidence against him. It lays down that the accused shall not render himself/herself liable to punishment by refusing to answer such questions, or by giving false answers to them. Further, proviso (b) to Section 315(1) CrPC mandates that even though an accused person can be a competent witness for the defence, his/her failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial. It is evident that Section 161(2) CrPC enables a person to choose silence in response to questioning by a police officer during

- a the stage of investigation, and as per the scheme of Section 313(3) and proviso (b) to Section 315(1) of the Code, adverse inferences cannot be drawn on account of the accused person's silence during the trial stage.

Historical origins of the "right against self-incrimination"

- b 92. The right of refusal to answer questions that may incriminate a person is a procedural safeguard which has gradually evolved in common law and bears a close relation to the "right to fair trial". There are competing versions about the historical origins of this concept. Some scholars have identified the origins of this right in the medieval period. In that account, it was a response to the procedure followed by English judicial bodies such as the Star Chamber and the High Commissions which required the defendants and suspects to take ex officio oaths. These bodies mainly decided cases involving religious non-conformism in a Protestant dominated society, as well as offences like treason and sedition. Under an ex officio oath the defendant was required to answer all questions posed by the Judges and prosecutors during the trial and the failure to do so would attract punishments that often involved physical torture. It was the resistance to this practice of compelling the accused to speak which led to demands for a "right to silence".
- c 93. In an academic commentary, Leonard Levy (1969) had pointed out that the doctrinal origins of the right against self-incrimination could be traced back to the Latin maxim *nemo tenetur seipsum prodere* (i.e. no one is bound to accuse himself) and the evolution of the concept of "due process of law" enumerated in the Magna Carta. [Refer Leonard Levy, "The Right against Self-Incrimination: History and Judicial History"⁴³.]
- d 94. The use of the ex officio oath by the ecclesiastical courts in medieval England had come under criticism from time to time, and the most prominent cause for discontentment came with its use in the Star Chamber and the High Commissions. Most scholarship has focussed on the sedition trial of John Lilburne (a vocal critic of Charles I, the then monarch) in 1637, when he refused to answer questions put to him on the ground that he had not been informed of the contents of the written complaint against him. John Lilburne went on to vehemently oppose the use of ex officio oaths, and the Parliament of the time relented by abolishing the Star Chamber and the High Commission in 1641. This event is regarded as an important landmark in the evolution of the "right to silence".
- e 95. However, in 1648 a Special Committee of Parliament conducted an investigation into the loyalty of Members whose opinions were offensive to the army leaders. The Committee's inquisitorial conduct and its requirement that witnesses take an oath to tell the truth provoked opponents to condemn what they regarded as a revival of the Star Chamber tactics. John Lilburne was once again tried for treason before this Committee, this time for his outspoken criticism of the leaders who had prevailed in the struggle between the supporters of the monarch and those of Parliament in the English Civil
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⁴³ 84(1) Political Science Quarterly 1-29 (March 1969)

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War. John Lilburne invoked the spirit of the Magna Carta as well as the 1628 Petition of Right to argue that even after common law indictment and without oath, he did not have to answer questions against or concerning himself. He drew a connection between the right against self-incrimination and the guarantee of a fair trial by invoking the idea of "due process of law" which had been stated in the Magna Carta. a

96. John H. Langbein (1994) has offered more historical insights into the emergence of the "right to silence". [John H. Langbein, "The Historical Origins of the Privilege against Self-Incrimination at Common Law"⁴⁴.] He draws attention to the fact that even though ex officio oaths were abolished in 1641, the practice of requiring the defendants to present their own defence in criminal proceedings continued for a long time thereafter. b

97. The Star Chamber and the High Commissions had mostly tried cases involving religious non-conformists and political dissenters, thereby attracting considerable criticism. Even after their abolition, the defendants in criminal courts did not have the right to be represented by a lawyer ("right to counsel") or the right to request the presence of the defence witnesses ("right of compulsory process"). Hence, the defendants were more or less compelled to testify on their own behalf. Even though the threat of physical torture on account of remaining silent had been removed, the defendant would face a high risk of conviction if he/she did not respond to the charges by answering the material questions posed by the Judge and the prosecutor. In presenting his/her own defence during the trial, there was a strong likelihood that the contents of such testimony could strengthen the case of the prosecution and lead to conviction. c

98. With the passage of time, the right of a criminal defendant to be represented by a lawyer eventually emerged in the common law tradition. A watershed in this regard was the Treason Act of 1695 (c. 3) which provided for a "right to counsel" as well as "compulsory process" in cases involving offences such as treason. Gradually, the right to be defended by a counsel was extended to more offences, but the role of the counsel was limited in the early years. For instance the defence lawyers could only help their clients with questions of law and could not make submissions related to the facts. d

99. The practice of requiring the accused persons to narrate or contest the facts on their own corresponds to a prominent feature of an inquisitorial system i.e. the testimony of the accused is viewed as the "best evidence" that can be gathered. The premise behind this is that innocent persons should not be reluctant to testify on their own behalf. This approach was followed in the inquisitorial procedure of the ecclesiastical courts and had thus been followed in other courts as well. The obvious problem with compelling the accused to testify on his own behalf is that an ordinary person lacks the legal training to effectively respond to suggestive and misleading questioning, which could come from the prosecutor or the Judge. Furthermore, even an innocent person is at an inherent disadvantage in an environment where there may be unintentional irregularities in the testimony. Most importantly the e

44 92(5) Michigan Law Review 1047-1085 (March 1994)

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- a burden of proving innocence by refuting the charges was placed on the defendant himself. In the present day, the inquisitorial conception of the defendant being the best source of evidence has long been displaced with the evolution of adversarial procedure in the common law tradition.

100. Criminal defendants have been given protections such as the presumption of innocence, right to counsel, the right to be informed of charges, the right of compulsory process and the standard of proving guilt beyond reasonable doubt among others. It can hence be stated that it was only with the subsequent emergence of the "right to counsel" that the accused's "right to silence" became meaningful. With the consolidation of the role of the defence lawyers in criminal trials, a clear segregation emerged between the testimonial function performed by the accused and the defensive function performed by the lawyer. This segregation between the testimonial and defensive functions is now accepted as an essential feature of a fair trial so as to ensure a level playing field between the prosecution and the defence. In addition to a defendant's "right to silence" during the trial stage, the protections were extended to the stage of pre-trial inquiry as well. With the enactment of the Sir John Jervis Act of 1848, provisions were made to advise the accused that he might decline to answer questions put to him in the pre-trial inquiry and to caution him that his answers to pre-trial interrogation might be used as evidence against him during the trial stage.

101. The judgment in *Nandini Satpathy v. P.L. Dani*⁴⁵, referred to the following extract from a decision of the US Supreme Court in *Brown v. Walker*⁴⁶, which had later been approvingly cited by Warren, C.J. in *Miranda v. Arizona*⁴⁷: (*Nandini Satpathy case*⁴⁵, SCC pp. 438-39, para 31)

- e "31. ... The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which have long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, were not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the case with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier State trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan Minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial

h ⁴⁵ (1978) 2 SCC 424 : 1978 SCC (Cr) 236
⁴⁶ 401 F.2d 819 : 161 US 591 (1895)
⁴⁷ 16 L Ed 2d 694 : 384 US 436 (1965)

opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.”

Underlying rationale of the right against self-incrimination

102. As mentioned earlier “the right against self-incrimination” is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives—firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily. It is quite possible that a person suspected or accused of a crime may have been compelled to testify through methods involving coercion, threats or inducements during the investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the “rule against involuntary confessions” is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the Judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts.

103. The concerns about the “voluntariness” of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements—often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined. In this sense, “the right against self-incrimination” is a vital safeguard against torture and other “third-degree methods” that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. The exclusion of compelled testimony is important otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such “short cuts” will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the “right against self-incrimination” is a vital protection to ensure that the prosecution discharges the said onus.

* Ed.: As observed in *Brown v. Walker*, 401. Fd 819 at p. 821 : 161 US 591 (1895)

104. These concerns have been recognised in Indian as well as foreign judicial precedents. For instance, Das Gupta, J. had observed in *State of Bombay v. Kathi Kalu Oghad*⁴⁸, SCR at pp. 43-44: (AIR p. 1819, para 30)

a "30. ... for long it has been generally agreed among those who have devoted serious thought to these problems that few things could be more harmful to the detection of crime or conviction of the real culprit, few things more likely to hamper the disclosure of truth than to allow investigators or prosecutors to slide down the easy path of producing by compulsion, evidence, whether oral or documentary, from an accused person. It has been felt that the existence of such an easy way would tend to dissuade persons in charge of investigation or prosecution from conducting diligent search for reliable independent evidence and from sifting of available materials with the care necessary for ascertainment of truth. If it is permissible in law to obtain evidence from the accused person by compulsion, why tread the hard path of laborious investigation and prolonged examination of other men, materials and documents? It has been well said that an abolition of this privilege would be an incentive for those in charge of enforcement of law 'to sit comfortably in the shade rubbing red pepper into a poor devil's eyes rather than to go about in the sun hunting up evidence'. (Sir James Fitzjames Stephen, *History of Criminal Law*, p. 442.) No less serious is the danger that some accused persons at least, may be induced to furnish evidence against themselves which is totally false—out of sheer despair and an anxiety to avoid an unpleasant present. Of all these dangers the Constitution-makers were clearly well aware and it was to avoid them that Article 20(3) was put in the Constitution."

e 105. The rationale behind the Fifth Amendment in the US Constitution was eloquently explained by Goldberg, J. in *Murphy v. Waterfront Commission of New York Harbor*⁴⁹, US at p. 55: (1. Ed pp. 681-82)

f "... It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair State-individual balance by requiring the Government to leave the individual alone until good cause is shown for disturbing him and by requiring the Government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realisation that the privilege, while sometimes 'a shelter to the guilty', is often 'a protection to the innocent'."

h 48 AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10
49 121 L Ed 2d 678 : 378 US 52 (1963)

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106. A similar view was articulated by Lord Hailsham of St Marylebone in *Wong Kam-ming v. R.*⁵⁰, All ER at p. 946: (AC p. 261 B-C)

"... any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary."

107. V.R. Krishna Iyer, J. echoed similar concerns in *Nandini Satpathy case*⁴⁵: (SCC p. 442, para 34)

"34. ... And Article 20(3) is a human article, a guarantee of dignity and integrity and of inviolability of the person and refusal to convert an adversary system into an inquisitorial scheme in the antagonistic ante-chamber of a police station. And in the long run, that investigation is best which uses stratagems least, that policeman deserves respect who gives his fists rest and his wits restlessness. The police are part of us and must rise in people's esteem through firm and friendly, not foul and sneaky strategy."

108. In spite of the constitutionally entrenched status of the right against self-incrimination, there have been some criticisms of the policy underlying the same. John Wigmore (1960) argued against a broad view of the privilege which extended the same to the investigative stage. [Refer John Wigmore, "The Privilege against Self-Incrimination, Its Constitutional Affection, Raison d'être and Miscellaneous Implications"⁵¹.] He has asserted that the doctrinal origins of the "rule against involuntary confessions" in evidence law and those of the "right to self-incrimination" were entirely different and catered to different objectives. In the learned author's opinion, the "rule against involuntary confessions" evolved on account of the distrust of statements made in custody. The objective was to prevent these involuntary statements from being considered as evidence during trial but there was no prohibition against relying on statements made involuntarily during investigation. Wigmore argued that the privilege against self-incrimination should be viewed as a right that was confined to the trial stage, since the Judge can intervene to prevent an accused from revealing incriminating information at that stage, while similar oversight is not always possible during the pre-trial stage.

50 1980 AC 247 : (1979) 2 WLR 81 : (1979) 1 All ER 939 (PC)

45 *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236

51 51 Journal of Criminal Law, Criminology and Police Science 138 (1960)

109. In recent years, scholars such as David Dolinko (1986), Akhil Reed Amar (1997) and Mike Redmayne (2007) among others have encapsulated the objections to the scope of this right. [See David Dolinko, "Is There a Rationale for the Privilege against Self-Incrimination?"⁵²; Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* (New Haven: Yale University Press, 1997) at pp. 65-70; Mike Redmayne, "Re-thinking the Privilege against Self-Incrimination"⁵³.]

110. It is argued that in aiming to create a fair State-individual balance in criminal cases, the task of the investigators and prosecutors is made unduly difficult by allowing the accused to remain silent. If the overall intent of the criminal justice system is to ensure public safety through expediency in investigations and prosecutions, it is urged that the privilege against self-incrimination protects the guilty at the cost of such utilitarian objectives. Another criticism is that adopting a broad view of this right does not deter improper practices during investigation and it instead encourages investigators to make false representations to courts about the voluntary or involuntary nature of custodial statements. It is reasoned that when investigators are under pressure to deliver results there is an inadvertent tendency to rely on methods involving coercion, threats, inducement or deception in spite of the legal prohibitions against them. Questions have also been raised about conceptual inconsistencies in the way that courts have expanded the scope of this right. One such objection is that if the legal system is obliged to respect the mental privacy of individuals, then why is there no prohibition against compelled testimony in civil cases which could expose parties to adverse consequences. Furthermore, questions have also been asked about the scope of the privilege being restricted to testimonial acts while excluding physical evidence which can be extracted through compulsion.

111. In response to John Wigmore's thesis about the separate foundations of the "rule against involuntary confessions", we must recognise the infusion of constitutional values into all branches of law, including procedural areas such as the law of evidence. While the abovementioned criticisms have been made in academic commentaries, we must defer to the judicial precedents that control the scope of Article 20(3). For instance, the interrelationship between the privilege against self-incrimination and the requirements of observing due process of law were emphasised by William Douglas, J. in *Rochin v. California*⁵⁴, US at p. 178: (L. Id p. 193)

"As an original matter it might be debatable whether the provision in the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself' serves the ends of justice. Not all civilised legal procedures recognise it. But the choice was made by the framers, a choice which sets a standard for legal trials in this country.

⁵² 33 University of California Los Angeles Law Review 1063-1148 (1986)

⁵³ 27 Oxford Journal of Legal Studies 209-232 (Summer 2007)

⁵⁴ 96 L. Ed 183 : 342 US 165 (1951)

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The framers made it a standard of due process for prosecutions by the Federal Government. If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say it is not a requirement of due process for a trial in the State courthouse." a

I-A. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?

112. The respondents have submitted that the compulsory administration of the impugned tests will only be sought to boost investigation efforts and that the test results by themselves will not be admissible as evidence. The next prong of this position is that if the test results enable the investigators to discover independent materials that are relevant to the case, such subsequently discovered materials should be admissible during trial. In order to evaluate this position, we must answer the following questions: b

- Firstly, we should clarify the scope of the "right against self-incrimination" i.e. whether it should be construed as a broad protection that extends to the investigation stage or should it be viewed as a narrower right confined to the trial stage? c
- Secondly, we must examine the ambit of the words "accused of any offence" in Article 20(3) i.e. whether the protection is available only to persons who are formally accused in criminal cases, or does it extend to include suspects and witnesses as well as those who apprehend incrimination in cases other than the one being investigated? d
- Thirdly, we must evaluate the evidentiary value of independent materials that are subsequently discovered with the help of the test results. In light of the "theory of confirmation by subsequent facts" incorporated in Section 27 of the Evidence Act, 1872 we need to examine the compatibility between this section and Article 20(3). Of special concern are situations when persons could be compelled to reveal information which leads to the discovery of independent materials. To answer this question, we must clarify what constitutes "incrimination" for the purpose of invoking Article 20(3). e

Applicability of Article 20(3) to the stage of investigation

113. The question of whether Article 20(3) should be narrowly construed as a trial right or a broad protection that extends to the stage of investigation has been conclusively answered by our courts. In *M.P. Sharma v. Satish Chandra*⁵⁵, it was held by Jagannadhadas, J. at SCR pp. 1087-88: (AIR p. 304, para 10) f

"10. Broadly stated the guarantee in Article 20(3) is against 'testimonial compulsion'. It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness stand. We can see no reason to confine the content of the h

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a constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. ...
Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the courtroom.

b The phrase used in Article 20(3) is 'to be a witness' and not to 'appear as a witness': It follows that the protection afforded to an accused insofar as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the courtroom but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case."

c 114. These observations were cited with approval by B.P. Sinha, C.J. in *State of Bombay v. Kathi Kalu Oghad*⁴⁸, SCR at pp. 26-28. In the minority opinion, Das Gupta, J. affirmed the same position, *ibid.* at SCR p. 40; (AIR p. 1818, para 22)

d "22. ... If the protection was intended to be confined to being a witness in court then really it would have been an idle protection. It would be completely defeated by compelling a person to give all the evidence outside court and then, having what he was so compelled to do, proved in court through other witnesses. An interpretation which so completely defeats the constitutional guarantee cannot, of course, be correct. The contention that the protection afforded by Article 20(3) is limited to the stage of trial must therefore be rejected."

e 115. The broader view of Article 20(3) was consolidated in *Nandini Satpathy v. P.L. Dani*⁴⁵:

f "21. ... Any giving of evidence, any furnishing of information, if likely to have an incriminating impact, answers the description of being witness against oneself. Not being limited to the forensic stage by express words in Article 20(3), we have to construe the expression to apply to every stage where furnishing of information and collection of materials takes place. That is to say, even the investigation at the police level is embraced by Article 20(3). This is precisely what Section 161(2) means. That sub-section relates to oral examination by police officers and grants immunity at that stage. Briefly, the Constitution and the Code are coterminous in the protective area. While the Code may be changed, the Constitution is more enduring. Therefore, we have to base our conclusion

h 48 AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10
45 (1978) 2 SCC 421 : 1978 SCC (Cr) 236

not merely upon Section 161(2) but on the more fundamental protection, although equal in ambit, contained in Article 20(3).

(SCC p. 435, para 21) a

* * *

44. ... If the police can interrogate to the point of self-accusation, the subsequent exclusion of that evidence at the trial hardly helps because the harm has been already done. The police will prove through other evidence what they have procured through forced confession. So it is that the foresight of the framers has pre-empted self-incrimination at the incipient stages by not expressly restricting it to the trial stage in court. True, compelled testimony previously obtained is excluded. But the preventive blow falls also on pre-court testimonial compulsion. The condition, as the decisions now go, is that the person compelled must be an accused. Both precedent procurement and subsequent exhibition of self-incriminating testimony are obviated by intelligent constitutional anticipation." (SCC p. 449, para 44) b c

116. In upholding this broad view of Article 20(3), V.R. Krishna Iyer, J. relied heavily on the decision of the US Supreme Court in *Miranda v. Arizona*⁴⁷. The majority opinion (by Earl Warren, C.J.) laid down that custodial statements could not be used as evidence unless the police officers had administered warnings about the accused's right to remain silent. The decision also recognised the right to consult a lawyer prior to and during the course of custodial interrogations. The practice promoted by this case is that it is only after a person has "knowingly and intelligently" waived of these rights after receiving a warning that the statements made thereafter can be admitted as evidence. The safeguards were prescribed in the following manner *ibid.* at US pp. 444-45: (L Ed pp. 706-07) d e

"... the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney f g h

47 16 L Ed 2d 691; 384 US 436 (1965)

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a before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."

b 117. These safeguards were designed to mitigate the disadvantages faced by a suspect in a custodial environment. This was done in recognition of the fact that methods involving deception and psychological pressure were routinely used and often encouraged in police interrogations. Emphasis was placed on the ability of the person being questioned to fully comprehend and understand the content of the stipulated warning. It was held *ibid.* at US pp. 457-58: (*Miranda case*⁴⁷, 1. Ed pp. 713-14)

c "In these cases, we might not find the defendant's statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect the precious Fifth Amendment right is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. ... It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. (Professor Sutherland, *Crime and Confession*⁵⁶.) The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."

e 118. The opinion also explained the significance of having a counsel present during a custodial interrogation. It was noted, *ibid.* at US pp. 469-70: (*Miranda case*⁴⁷, 1. Ed p. 721)

f "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the

g h
47 *Miranda v. Arizona*, 161, Ed 2d 694 : 384 US 436 (1965)
56 79 Harvard Law Review 21, 37 (1965)

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admonishment of the right to remain silent without more 'will benefit only the recidivist and the professional'. (Brief for the *National District Attorneys Association* as amicus curiae, p. 14.) Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. (Cited from *Escobedo v. Illinois*⁵⁷, US at p. 485....) Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."

119. The majority decision in *Miranda*⁴⁷ was not a sudden development in the US constitutional law. The scope of the privilege against self-incrimination had been progressively expanded in several prior decisions. The notable feature was the recognition of the interrelationship between the Fifth Amendment and the Fourteenth Amendment's guarantee that the Government must observe the "due process of law" as well as the Fourth Amendment's protection against "unreasonable search and seizure". While it is not necessary for us to survey these decisions, it will suffice to say that after *Miranda*⁴⁷ administering a warning about a person's right to silence during custodial interrogations as well as obtaining a voluntary waiver of the prescribed rights has become a ubiquitous feature in the US criminal justice system. In the absence of such a warning and voluntary waiver, there is a presumption of compulsion with regard to the custodial statements thereby rendering them inadmissible as evidence. The position in India is different since there is no automatic presumption of compulsion in respect of custodial statements. However, if the fact of compulsion is proved then the resulting statements are rendered inadmissible as evidence.

Who can invoke the protection of Article 20(3)?

120. The decision in *Nandini Satpathy case*⁴⁵ also touched on the question of who is an "accused" for the purpose of invoking Article 20(3). This question had been left open in *M.P. Sharma case*⁵⁵. Subsequently, it was addressed in *Kathi Kalu Oghad*⁴⁸ at SCR p. 37: (AIR p. 1817, para 16)

"16. (7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

121. While there is a requirement of formal accusation for a person to invoke Article 20(3) it must be noted that the protection contemplated by Section 161(2) CrPC is wider. Section 161(2) read with 161(1) protects "any person supposed to be acquainted with the facts and circumstances of the

57 121. Ed 2d 977 : 378 US 478 (1963)

47 *Miranda v. Arizona*, 16 L. Ed 2d 694 : 384 US 436 (1965)

45 *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236

55 *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

48 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10

case" in the course of examination by the police. The language of this provision is as follows:

a "161. *Examination of witnesses by police.*—(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

b (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

c (3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records."

d 122. Therefore the "right against self-incrimination" protects persons who have been formally accused as well as those who are examined as suspects in criminal cases. It also extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated. Krishna Iyer, J. clarified this position: (*Nandini Satpathy case*⁴⁵, SCC p. 435, para 21)

e "21. ... The learned Advocate General, influenced by American decisions rightly agreed that in expression Section 161(2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20(3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161(2). This latter provision meaningfully uses the expression 'expose himself to a criminal charge'. Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges."

f It was further observed: (SCC pp. 451-52, para 50)

g "50. ... "To be witness against oneself" is not confined to particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from 'tendency to be exposed to a criminal charge'. A 'criminal charge' covers any criminal charge then under investigation or trial or which imminently threatens the accused." (emphasis in original)

h 123. Even though Section 161(2) CrPC casts a wide protective net to protect the formally accused persons as well as suspects and witnesses during the investigative stage, Section 132 of the Evidence Act limits the

⁴⁵ *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236

applicability of this protection to witnesses during the trial stage. The latter provision provides that witnesses cannot refuse to answer questions during a trial on the ground that the answers could incriminate them. However, the proviso to this section stipulates that the content of such answers cannot expose the witness to arrest or prosecution, except for a prosecution for giving false evidence. Therefore, the protection accorded to witnesses at the stage of trial is not as wide as the one accorded to the accused, suspects and witnesses during investigation [under Section 161(2) CrPC]. Furthermore, it is narrower than the protection given to the accused during the trial stage [under Section 313(3) and proviso (b) to Section 315(1) CrPC]. The legislative intent is to preserve the fact-finding function of a criminal trial.

124. Section 132 of the Evidence Act reads:

"132. *Witness not excused from answering on ground that answer will criminate.*—A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso.—Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

125. Since the extension of the "right against self-incrimination" to suspects and witnesses has its basis in Section 161(2) CrPC it is not readily available to persons who are examined during proceedings that are not governed by the Code. There is a distinction between proceedings of a purely criminal nature and those proceedings which can culminate in punitive remedies and yet cannot be characterised as criminal proceedings. The consistent position has been that ordinarily Article 20(3) cannot be invoked by witnesses during proceedings that cannot be characterised as criminal proceedings. In administrative and quasi-criminal proceedings, the protection of Article 20(3) becomes available only after a person has been formally accused of committing an offence. For instance in *Raja Narayanlal Bansilal v. Muneck Phiroz Mistry*⁵⁸, the contention related to the admissibility of a statement made before an Inspector who was appointed under the Companies Act, 1923 to investigate the affairs of a company and report thereon. It had to be decided whether the persons who were examined by the Inspector concerned could claim the protection of Article 20(3). The question was answered, *ibid.* at SCR p. 440: (AIR p. 39, para 24)

"24. ... The scheme of the relevant sections is that the investigation begins broadly with a view to examine the management of the affairs of the company to find out whether any irregularities have been committed or not. In such a case there is no accusation, either formal or otherwise,

⁵⁸ AIR 1961 SC 29 : (1961) 1 SCR 417

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- a against any specified individual; there may be a general allegation that the affairs are irregularly, improperly or illegally managed; but who would be responsible for the affairs which are reported to be irregularly managed is a matter which would be determined at the end of the enquiry. At the commencement of the enquiry and indeed throughout its proceedings there is no accused person, no accuser and no accusation against anyone that he has committed an offence. In our opinion a general enquiry and investigation into the affairs of the company thus contemplated cannot be regarded as an investigation which starts with an accusation contemplated in Article 20(3) of the Constitution."
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126. A similar issue arose for consideration in *Ramesh Chandra Mehta v. State of W.B.*⁵⁹, wherein it was held at SCR p. 472: (AIR pp. 946-47, para 14)

- c "14. ... Normally a person stands in the character of an accused when a first information report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest, [which he is bound to do under Article 22(1) of the Constitution] for the purposes of holding an inquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act which is punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate."
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- e

- f 127. In *Balkishan A. Devidayal v. State of Maharashtra*⁶⁰, one of the contentious issues was whether the statements recorded by a Railway Police Force (RPF) officer during an inquiry under the Railway Property (Unlawful Possession) Act, 1966 would attract the protection of Article 20(3). Sarkaria, J. held that such an inquiry was substantially different from an investigation contemplated under CrPC, and therefore formal accusation was a necessary condition for a person to claim the protection of Article 20(3). It was observed: (SCC p. 623, para 70)

- g "70. To sum up, only a person against whom a formal accusation of the commission of an offence has been made can be a person 'accused of an offence' within the meaning of Article 20(3). Such formal accusation may be specifically made against him in an FIR or a formal complaint or any other formal document or notice served on that person, which ordinarily results in his prosecution in court. In the instant case no such formal accusation had been made against the appellant when his statement(s) in question were recorded by the RPF officer."

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- 59 AIR 1970 SC 940 : 1970 Cri LJ 863 : (1969) 2 SCR 461
60 (1980) 1 SCC 600 : 1981 SCC (Cri) 62

What constitutes "incrimination" for the purpose of Article 20(3)?

128. We can now examine the various circumstances that could "expose a person to criminal charges". The scenario under consideration is one where a person in custody is compelled to reveal information which aids the investigation efforts. The information so revealed can prove to be incriminatory in the following ways: a

- The statements made in custody could be directly relied upon by the prosecution to strengthen their case. However, if it is shown that such statements were made under circumstances of compulsion, they will be excluded from the evidence. b
- Another possibility is that of "derivative use" i.e. when information revealed during questioning leads to the discovery of independent materials, thereby furnishing a link in the chain of evidence gathered by the investigators.
- Yet another possibility is that of "transactional use" i.e. when the information revealed can prove to be helpful for the investigation and prosecution in cases other than the one being investigated. c
- A common practice is that of extracting materials or information, which are then compared with materials that are already in the possession of the investigators. For instance, handwriting samples and specimen signatures are routinely obtained for the purpose of identification or corroboration. d

129. The decision in *Nandini Satpathy case*⁴⁵ sheds light on what constitutes incrimination for the purpose of Article 20(3). Krishna Iyer, J. observed: (SCC pp. 449-50, para 46)

"46. ... In this sense, answers that would, in themselves, support a conviction are confessions but answers which have a reasonable tendency strongly to point out to the guilt of the accused are incriminatory. Relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Article 20(3) if elicited by pressure from the mouth of the accused. ... An answer acquires confessional status only if, in terms or substantially, all the facts which constitute the offence are admitted by the offender. If his statement also contains self-exculpatory matter it ceases to be a confession. Article 20(3) strikes at confessions and self-incriminations but leaves untouched other relevant facts." e

130. Reliance was also placed on the decision of the US Supreme Court in *Hoffman v. United States*⁶¹. The controversy therein was whether the privilege against self-incrimination was available to a person who was called on to testify as a witness in a Grand Jury investigation. Clark, J. answered the question in the affirmative at US pp. 486-87: (L. Ed p. 1124) f

"The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but g

⁴⁵ *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236
⁶¹ 95 L.Ed 1118 : 341 US 479 (1950) h

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a likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. ... But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. ... To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure [may] result."

b (internal citations omitted)

131. However, Krishna Iyer, J. also cautioned against including in the prohibition even those answers which might be used as a step towards obtaining evidence against the accused. It was stated: (*Nandini Satpathy case*⁴⁵, SCC p. 451, para 48)

c "48. ... The policy behind the privilege, under our scheme, does not swing so wide as to sweep out of admissibility statements neither confessional per se nor guilty in tendency but merely relevant facts which, viewed in any setting, does not have a sinister import. To spread the net so wide is to make a mockery of the examination of the suspect, so necessitous in the search for truth. Overbreadth undermines, and we demur to such morbid exaggeration of a wholesome protection. ... In *Kathi Kalu Oghad case*⁴⁸, this Court authoritatively observed, on the bounds between constitutional proscription and testimonial permission: (AIR p. 1815, para 12)

e "12. In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused at least probable, considered by itself."

f Again the court indicated that Article 20(3) could be invoked only against statements which 'had a *material bearing on the criminality* of the maker of the statement'. 'By itself' does not exclude the setting or other integral circumstances but means something in the fact disclosed a guilt element. Blood on clothes, gold bars with notorious marks and presence on the scene or possession of the lethal weapon or corrupt currency have a tale to tell, beyond red fluid, precious metal, gazing at the stars or testing sharpness or value of the rupee. The setting of the case is an implied component of the statement." (emphasis in original)

g 132. In the light of these observations, we must examine the permissibility of extracting statements which may furnish a link in the chain

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45 *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424 : 1978 SCC (Cri) 236

48 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10

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of evidence and hence create a risk of exposure to criminal charges. The crucial question is whether such derivative use of information extracted in a custodial environment is compatible with Article 20(3). It is a settled principle that statements made in custody are considered to be unreliable unless they have been subjected to cross-examination or judicial scrutiny. The scheme created by the Code of Criminal Procedure and the Evidence Act also mandates that confessions made before police officers are ordinarily not admissible as evidence and it is only the statements made in the presence of a Judicial Magistrate which can be given weightage. The doctrine of "excluding the fruit of a poisonous tree" has been incorporated in Sections 24, 25 and 26 of the Evidence Act, 1872 which read as follows:

"24. *Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.*—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

25. *Confession to police officer not proved.*—No confession made to a police officer, shall be proved as against a person accused of any offence.

26. *Confession by accused while in custody of police not to be proved against him.*—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

133. We have already referred to the language of Section 161 CrPC which protects the accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. It would also be useful to refer to Sections 162, 163 and 164 CrPC which lay down procedural safeguards in respect of statements made by persons during the course of investigation. However, Section 27 of the Evidence Act incorporates the "theory of confirmation by subsequent facts" i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which "furnish a link in the chain of evidence" needed for a successful prosecution. This provision reads as follows:

"27. *How much of information received from accused may be proved.*—Provided that, when any fact is proved to be discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

134. This provision permits the derivative use of custodial statements in the ordinary course of events. In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of *Miranda*⁴⁷ warnings. However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3).

135. The relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution was clarified in *Kathi Kalu Oghad*⁴⁸. It was observed in the majority opinion by Jagannadhadas, J., at SCR pp. 33-34: (AIR pp. 1815-16, para 13)

"13. ... The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that section. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self-incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. *It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion [has] been used in obtaining the information.*" (emphasis supplied)

This position was made amply clear at SCR pp. 35-36: (AIR p. 1816, para 15)

"15. ... Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was in fact exercised. In other words, it will be a question of fact in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it."

136. The minority opinion also agreed with the majority's conclusion on this point since Das Gupta, J., held at SCR p. 47: (*Kathi Kalu Oghad case*⁴⁸, AIR p. 1820, para 36)

"36. ... Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of the information, whether it amounts to a confession or not, as relates

⁴⁷ *Miranda v. Arizona*, 16 L Ed 2d 694 : 384 US 436 (1965)

⁴⁸ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10

distinctly to the fact thereby discovered, may be proved. It cannot be disputed that by giving such information the accused furnishes evidence and therefore is a 'witness' during the investigation. Unless however he is 'compelled' to give the information he cannot be said to be 'compelled' to be a witness; and so Article 20(3) is not infringed. Compulsion is not however inherent in the receipt of information from an accused person in the custody of a police officer. There may be cases where an accused in custody is compelled to give the information later on sought to be proved under Section 27. There will be other cases where the accused gives the information without any compulsion. Where the accused is compelled to give information it will be an infringement of Article 20(3); but there is no such infringement where he gives the information without any compulsion."

137. We must also address another line of reasoning which was adopted in one of the impugned judgments. It was stated that the exclusionary rule in evidence law is applicable to statements that are inculpatory in nature. Based on this premise, it was observed that at the time of administering the impugned tests, it cannot be ascertained whether the resulting revelations or inferences will prove to be inculpatory or exculpatory in due course. Taking this reasoning forward, it was held that the compulsory administration of the impugned tests should be permissible since the same does not necessarily lead to the extraction of inculpatory evidence. We are unable to agree with this reasoning.

138. The distinction between inculpatory and exculpatory evidence gathered during investigation is relevant for deciding what will be admissible as evidence during the trial stage. The exclusionary rule in evidence law mandates that if inculpatory evidence has been gathered through improper methods (involving coercion, threat or inducement among others) then the same should be excluded from the trial, while there is no such prohibition on the consideration of exculpatory evidence. However, this distinction between the treatment of inculpatory and exculpatory evidence is made retrospectively at the trial stage and it cannot be extended back to the stage of investigation. If we were to permit the admission of involuntary statement on the ground that at the time of asking a question it is not known whether the answer will be inculpatory or exculpatory, the "right against self-incrimination" will be rendered meaningless. The law confers on "any person" who is examined during an investigation, an effective choice between speaking and remaining silent. This implies that it is for the person being examined to decide whether the answer to a particular question will eventually prove to be inculpatory or exculpatory. Furthermore, it is also likely that the information or materials collected at an earlier stage of investigation can prove to be inculpatory in due course.

139. However, it is conceivable that in some circumstances the testimony extracted through compulsion may not actually lead to exposure to criminal charges or penalties. For example this is a possibility when the investigators make an offer of immunity against the direct use, derivative use or

- transactional use of the testimony. Immunity against direct use entails that a witness will not be prosecuted on the basis of the statements made to the investigators. A protection against derivative use implies that a person will not be prosecuted on the basis of the fruits of such testimony. Immunity against transactional use will shield a witness from criminal charges in cases other than the one being investigated. It is of course entirely up to the investigating agencies to decide whether to offer immunity and in what form. Even though this is distinctly possible, it is difficult to conceive of such a situation in the context of the present case. A person who is given an offer of immunity against prosecution is far more likely to voluntarily cooperate with the investigation efforts. This could be in the form of giving testimony or helping in the discovery of material evidence. If a person is freely willing to cooperate with the investigation efforts, it would be redundant to compel such a person to undergo the impugned tests. If reliance on such tests is sought for refreshing a cooperating witness' memory, the person will in all probability give his/her consent to undergo these tests.

140. It could be argued that the compulsory administration of the impugned tests can prove to be useful in instances where the cooperating witness has difficulty in remembering the relevant facts or is wilfully concealing crucial details. Such situations could very well arise when a person who is a co-accused is offered immunity from prosecution in return for cooperating with the investigators. Even though the right against self-incrimination is not directly applicable in such situations, the relevant legal inquiry is whether the compulsory administration of the impugned tests meets the requisite standard of "substantive due process" for placing restraints on personal liberty.

141. At this juncture, it must be reiterated that Indian law incorporates the "rule against adverse inferences from silence" which is operative at the trial stage. As mentioned earlier, this position is embodied in a conjunctive reading of Article 20(3) of the Constitution and Sections 161(2), 313(3) and proviso (b) of Section 315(1) CrPC. The gist of this position is that even though an accused is a competent witness in his/her own trial, he/she cannot be compelled to answer questions that could expose him/her to incrimination and the trial Judge cannot draw adverse inferences from the refusal to do so. This position is cemented by prohibiting any of the parties from commenting on the failure of the accused to give evidence. This rule was lucidly explained in the English case of *Woolmington v. Director of Public Prosecutions*⁶², AC at p. 481:

"The 'right to silence' is a principle of common law and it means that normally courts or tribunals of fact should not be invited or encouraged to conclude, by parties or prosecutors, that a suspect or an accused is guilty merely because he has refused to respond to questions put to him by the police or by the Court."

⁶² 1935 AC 462 : 1935 All ER Rep 1 (HL.)

142. The 180th Report of the Law Commission of India (May 2002) dealt with this very issue. It considered arguments for diluting the "rule against adverse inferences from silence". Apart from surveying several foreign statutes and decisions, the Report took note of the fact that Section 342(2) of the erstwhile Code of Criminal Procedure, 1898 permitted the trial Judge to draw an inference from the silence of the accused. However, this position was changed with the enactment of the new Code of Criminal Procedure in 1973, thereby prohibiting the making of comments as well as the drawing of inferences from the fact of an accused's silence. In light of this, the Report concluded:

"180. ... We have reviewed the law in other countries as well as in India for the purpose of examining whether any amendments are necessary in the Code of Criminal Procedure, 1973. On a review, we find that no changes in the law relating to silence of the accused are necessary and if made, they will be ultra vires of Article 20(3) and Article 21 of the Constitution of India. We recommend accordingly."

143. Some commentators have argued that the "rule against adverse inferences from silence" should be broadly construed in order to give protection against non-penal consequences. It is reasoned that the fact of a person's refusal to answer questions should not be held against him/her in a wide variety of settings, including those outside the context of criminal trials. A hypothetical illustration of such a setting is a deportation hearing where an illegal immigrant could be deported following a refusal to answer questions or furnish materials required by the authorities concerned. This question is relevant for the present case because a person who refuses to undergo the impugned tests during the investigative stage could face non-penal consequences which lie outside the protective scope of Article 20(3). For example, a person who refuses to undergo these tests could face the risk of custodial violence, increased police surveillance or harassment thereafter. Even a person who is compelled to undergo these tests could face such adverse consequences on account of the contents of the test results if they heighten the investigators' suspicions. Each of these consequences, though condemnable, fall short of the requisite standard of "exposure to criminal charges and penalties" that has been enumerated in Section 161(2) CrPC. Even though Article 20(3) will not be applicable in such circumstances, reliance can be placed on Article 21 if such non-penal consequences amount to a violation of "personal liberty" as contemplated under the Constitution.

144. In the past, this Court has recognised the rights of prisoners (undertrials as well as convicts) as well as individuals in other custodial environments to receive "fair, just and equitable" treatment. For instance in *Sunil Batra v. Delhi Admn.*⁶³, it was decided that practices such as "solitary confinement" and the use of bar-fetters in jails were violative of Article 21. Hence, in circumstances where persons who refuse to answer questions during the investigative stage are exposed to adverse consequences of a non-penal nature, the inquiry should account for the expansive scope of Article 21 rather than the right contemplated by Article 20(3).

63 (1978) 4 SCC 494 : 1979 SCC (Cri) 155

I-B. Whether the results derived from the impugned techniques amount to "testimonial compulsion" thereby attracting the bar of Article 20(3)?

- a 145. The next issue is whether the results gathered from the impugned tests amount to "testimonial compulsion" thereby attracting the prohibition of Article 20(3). For this purpose, it is necessary to survey the precedents which deal with what constitutes "testimonial compulsion" and how testimonial acts are distinguished from the collection of physical evidence. Apart from the apparent distinction between evidence of a testimonial and physical nature,
 - b some forms of testimonial acts lie outside the scope of Article 20(3). For instance, even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with. The relevant consideration for extending the protection of
 - c Article 20(3) is whether the materials are likely to lead to incrimination by themselves or "furnish a link in the chain of evidence" which could lead to the same result. Hence, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators is not barred.
 - d 146. It is quite evident that the narcoanalysis technique involves a testimonial act. A subject is encouraged to speak in a drug-induced state, and there is no reason why such an act should be treated any differently from verbal answers during an ordinary interrogation. In one of the impugned judgments, the compulsory administration of the narcoanalysis technique was defended on the ground that at the time of conducting the test, it is not known
 - e whether the results will eventually prove to be inculpatory or exculpatory. We have already rejected this reasoning. We see no other obstruction to the proposition that the compulsory administration of the narcoanalysis technique amounts to "testimonial compulsion" and thereby triggers the protection of Article 20(3).
 - f 147. However, an unresolved question is whether the results obtained through polygraph examination and the BEAP test are of a testimonial nature. In both these tests, inferences are drawn from the physiological responses of the subject and no direct reliance is placed on verbal responses. In some forms of polygraph examination, the subject may be required to offer verbal answers such as "Yes" or "No", but the results are based on the measurement of changes in several physiological characteristics rather than
 - g these verbal responses. In the BEAP test, the subject is not required to give any verbal responses at all and inferences are drawn from the measurement of electrical activity in the brain. In the impugned judgments, it has been held that the results obtained from both the polygraph examination and the BEAP test do not amount to "testimony" thereby lying outside the protective scope of Article 20(3). The same assertion has been reiterated before us by the
 - h counsel for the respondents. In order to evaluate this position, we must examine the contours of the expression "testimonial compulsion".

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148. The question of what constitutes "testimonial compulsion" for the purpose of Article 20(3) was addressed in *M.P. Sharma case*⁵⁵. In that case, the Court considered whether the issuance of search warrants in the course of an investigation into the affairs of a company (following allegations of misappropriation and embezzlement) amounted to an infringement of Article 20(3). The search warrants issued under Section 96 of the erstwhile Code of Criminal Procedure, 1898 authorised the investigating agencies to search the premises and seize the documents maintained by the said company. The relevant observations were made by Jagannadhadas, J., at SCR pp. 1087-88: (AIR p. 304, para 10) a b

"10. ... The phrase used in Article 20(3) is 'to be a witness'. A person can 'be a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see Section 119 of the Evidence Act) or the like. 'To be a witness' is nothing more than 'to furnish evidence', and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes. c

... Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part." d

149. These observations suggest that the phrase "to be a witness" is not confined to oral testimony for the purpose of invoking Article 20(3) and that it includes certain non-verbal forms of conduct such as the production of documents and the making of intelligible gestures. However, in *Kathi Kalu Oghad*¹⁸ there was a disagreement between the majority and minority opinions on whether the expression "to be a witness" was the same as "to furnish evidence". In that case, this Court had examined whether certain statutory provisions, namely, Section 73 of the Evidence Act, Sections 5 and 6 of the Identification of Prisoners Act, 1920 and Section 27 of the Evidence Act were compatible with Article 20(3). Section 73 of the Evidence Act empowered courts to obtain specimen handwriting or signatures and finger impressions of an accused person for purposes of comparison. Sections 5 and 6 of the Identification of Prisoners Act empowered a Magistrate to obtain the photograph or measurements of an accused person. In respect of Section 27 of the Evidence Act, there was an agreement between the majority and the minority opinions that the use of compulsion to extract custodial statements amounts to an exception to the "theory of confirmation by subsequent facts". We have already referred to the relevant observations in an earlier part of this opinion. e f g

150. Both the majority and minority opinions ruled that the other statutory provisions mentioned above were compatible with Article 20(3), but adopted different approaches to arrive at this conclusion. In the majority h

⁵⁵ *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cr LJ 865 : 1954 SCR 1077

⁴⁸ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10

opinion it was held that the ambit of the expression "to be a witness" was narrower than that of "furnishing evidence". B.P. Sinha, C.J. observed. SCR
a at pp. 29-32: (*Kathi Kalu Oghad case*⁴⁸, AIR pp. 1814-15, paras 10-12)

"10. 'To be a witness' may be equivalent to 'furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification.
b 'Furnishing evidence' in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that—though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject—they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. Furthermore it must be assumed that the Constitution-makers were aware of the existing law, for example, Section 73 of the Evidence Act or Sections 5 and 6 of the Identification of Prisoners Act (33 of 1920). ...
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"11. ... The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not 'to be a witness'. 'To be a witness' means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said 'to be a witness' to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in *M.P. Sharma case*⁵⁵, that the prohibition in clause (3) of Article 20 covers not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him. ... Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the
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48 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10
55 *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person is called upon by the court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'.

12. In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of 'testimony'.

(emphasis supplied)

151. Hence, B.P. Sinha, C.J. construed the expression "to be a witness" as one that was limited to oral or documentary evidence, while further confining the same to statements that could lead to incrimination by themselves, as opposed to those used for the purpose of identification or comparison with facts already known to the investigators. The minority opinion authored by Das Gupta, J. (three Judges) took a different approach, which is evident from the following extracts, *ibid.* at SCR pp. 40-43: (*Kathi Kalu Oghad case*¹⁸, AIR pp. 1818-19, paras 23, 25 & 28-29)

"23. That brings us to the suggestion that the expression 'to be a witness' must be limited to a statement whether oral or in writing by an accused person imparting knowledge of relevant facts; but that mere production of some material evidence, whether documentary or

¹⁸ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10

a otherwise would not come within the ambit of this expression. This suggestion has found favour with the majority of the Bench; we think however that this is an unduly narrow interpretation. We have to remind ourselves that while on the one hand we should bear in mind that the Constitution-makers could not have intended to stifle legitimate modes of investigation we have to remember further that quite clearly they thought that certain things should not be allowed to be done, during the investigation, or trial, however helpful they might seem to be to the unfolding of truth and an unnecessary apprehension of disaster to the police system and the administration of justice, should not deter us from giving the words their proper meaning. It appears to us that to limit the meaning of the words 'to be a witness' in Article 20(3) in the manner suggested would result in allowing compulsion to be used in procuring the production from the accused of a large number of documents, which are of evidentiary value, sometimes even more so than any oral statement of a witness might be. ...

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d 25. There can be no doubt that to the ordinary user of English words, the word 'witness' is always associated with evidence, so that to say that to be a witness is to furnish evidence is really to keep to the natural meaning of the words.

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e 28. It is clear from the scheme of the various provisions, dealing with the matter that the governing idea is that to be evidence, the oral statement or a statement contained in a document, shall have a tendency to prove a fact—whether it be a fact in issue or a relevant fact—which is sought to be proved. Though this definition of evidence is in respect of proceedings in court it will be proper, once we have come to the conclusion, that the protection of Article 20(3) is available even at the stage of investigation, to hold that at that stage also the purpose of having a witness is to obtain evidence and the purpose of evidence is to prove a fact.

g 29. The illustrations we have given above show clearly that it is not only by imparting of his knowledge that an accused person assists the proving of a fact; he can do so even by other means, such as the production of documents which though not containing his own knowledge would have a tendency to make probable the existence of a fact in issue or a relevant fact."

h 152. Even though Das Gupta, J. saw no difference between the scope of the expressions "to be a witness" and "to furnish evidence", the learned Judge agreed with the majority's conclusion that for the purpose of invoking Article 20(3) the evidence must be incriminating by itself. This entailed that evidence could be relied upon if it is used only for the purpose of identification or comparison with information and materials that are already

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in the possession of the investigators. The following observations were made at SCR pp. 45-46: (*Kathi Kalu Oghad case*⁴⁸, AIR p. 1820, paras 33-35)

"33. ... But the evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other handwritings or certain other impressions, identity between the two sets is established. By themselves, these impressions or the handwritings do not incriminate the accused person, or even tend to do so. That is why it must be held that by giving these impressions or specimen handwriting, the accused person does not furnish evidence against himself. ...

34. This view, it may be pointed out, does not in any way militate against the policy underlying the rule against 'testimonial compulsion' we have already discussed above. There is little risk, if at all, in the investigator or the prosecutor being induced to lethargy or inaction because he can get such handwriting or impressions from an accused person. For, by themselves they are of little or of no assistance to bring home the guilt of an accused. Nor is there any chance of the accused to mislead the investigator into wrong channels by furnishing false evidence. For, it is beyond his power to alter the ridges or other characteristics of his hand, palm or finger or to alter the characteristics of his handwriting.

35. We agree therefore with the conclusion reached by the majority of the Bench that there is no infringement of Article 20(3) of the Constitution by compelling an accused person to give his specimen handwriting or signature; or impressions of his fingers, palm or foot to the investigating officer or under orders of a court for the purpose of comparison under the provisions of Section 73 of the Evidence Act, 1872; though we have not been able to agree with the view of our learned brethren that 'to be a witness' in Article 20(3) should be equated with the imparting of personal knowledge or that an accused does not become a witness when he produces some document not in his own handwriting even though it may tend to prove facts in issue or relevant facts against him."

153. Since the majority decision in *Kathi Kalu Oghad*⁴⁸ is the controlling precedent, it will be useful to restate the two main premises for understanding the scope of "testimonial compulsion". The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that amount to "personal testimony" thereby coming within the prohibition contemplated by Article 20(3). In most cases, such "personal testimony" can be readily distinguished from material evidence such as bodily substances and other physical objects. The second premise is that in some cases, oral or written statements can be relied upon but only for the purpose of identification or comparison with facts and materials that are already in the possession of the investigators. The bar of Article 20(3) can be invoked when the statements are likely to lead to

⁴⁸ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10

a incrimination by themselves or "furnish a link in the chain of evidence" needed to do so. We must emphasise that a situation where a testimonial response is used for comparison with facts already known to the investigators is inherently different from a situation where a testimonial response helps the investigators to subsequently discover fresh facts or materials that could be relevant to the ongoing investigation.

b 154. The recognition of the distinction between testimonial acts and physical evidence for the purpose of invoking Article 20(3) of the Constitution finds a close parallel in some foreign decisions. In *Schmerber v. California*⁶⁴, the US Supreme Court had to determine whether an involuntary blood test of a defendant had violated the Fifth Amendment. The defendant was undergoing treatment at a hospital following an automobile accident. A blood sample was taken against his will at the direction of a police officer. Analysis of the same revealed that Schmerber had been intoxicated and these results were admitted into evidence, thereby leading to his conviction for drunk driving. An objection was raised on the basis of the Fifth Amendment and the majority opinion (Brennan, J.) relied on a distinction between evidence of a "testimonial" or "communicative" nature as opposed to evidence of a "physical" or "real nature", concluding that the privilege against self-incrimination applied to the former but not to the latter. In arriving at this decision, reference was made to several precedents with a prominent one being *Holt v. United States*⁶⁵. In that case, a defendant was forced to try on an article of clothing during the course of investigation. It had been ruled that the privilege against self-incrimination prohibited the use of compulsion to "extort communications" from the defendant, but not the use of the defendant's body as evidence.

e 155. In addition to citing John Wigmore's position that "the privilege is limited to testimonial disclosures" the Court in *Schmerber*⁶⁴ also took note of other examples where it had been held that the privilege did not apply to physical evidence, which included "compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture". However, it was cautioned that the privilege applied to testimonial communications, irrespective of what form they might take. Hence it was recognised that the privilege not only extended to verbal communications, but also to written words as well as gestures intended to communicate (for example pointing or nodding). This line of thinking becomes clear because the majority opinion indicated that the distinction between testimonial and physical acts may not be readily applicable in the case of lie detector tests. g Brennan, J. had noted, US at p. 764: (*Schmerber case*⁶⁴, 1 Ed p. 916)

"Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain 'physical

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64 16 L Ed 2d 908 : 384 US 757 (1965)
65 54 L Ed 1021 : 218 US 245 (1910)

evidence', for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard'."

156. In a recently published paper, Michael S. Pardo (2008) has made the following observation in respect of this judgment [cited from Michael S. Pardo, "Self-Incrimination and the Epistemology of Testimony"⁶⁶, *Cardozo Law Review* at pp. 1027-28]:

"the Court notes that even the physical-testimonial distinction may break down when physical evidence is meant to compel 'responses which are essentially testimonial' such as a lie detector test measuring physiological responses during interrogation."

157. Following *Schmerber*⁶⁴ decision, the distinction between physical and testimonial evidence has been applied in several cases. However, some complexities have also arisen in the application of the testimonial-physical distinction to various fact situations. While we do not need to discuss these cases to decide the question before us, we must take note of the fact that the application of the testimonial-physical distinction can be highly ambiguous in relation to non-verbal forms of conduct which nevertheless convey relevant information.

158. Among other jurisdictions, the European Court of Human Rights (ECtHR) has also taken note of the distinction between testimonial and physical acts for the purpose of invoking the privilege against self-incrimination. In *Saunders v. United Kingdom*⁶⁷, it was explained:

"... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence ... The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."

⁶⁶ 30 *Cardozo Law Review* 1023-46 (December 2008)

⁶⁴ *Schmerber v. California*, 16 L Ed 2d 908 : 384 US 757 (1965)

⁶⁷ (1996) 23 EHRR 313

Evolution of the law on "medical examination"

a 159. With respect to the testimonial-physical distinction, an important statutory development in our legal system was the introduction of provisions for medical examination with the overhauling of the Code of Criminal Procedure in 1973. Sections 53 and 54 CrPC contemplate the medical examination of a person who has been arrested either at the instance of the investigating officer or even the arrested person himself. The same can also be done at the direction of the jurisdictional court.

b 160. However, there were no provisions for authorising such a medical examination in the erstwhile Code of Criminal Procedure, 1898. The absence of a statutory basis for the same had led courts to hold that a medical examination could not be conducted without the prior consent of the person who was to be subjected to the same. For example in *Bhondar v. Emperor*⁶⁸, Lord Williams, J. held at AIR p. 602:

c "... If it were permitted forcibly to take hold of a prisoner and examine his body medically for the purpose of qualifying some medical witness to give medical evidence in the case against the accused there is no knowing where such procedure would stop. ... Any such examination without the consent of the accused would amount to an assault and I am quite satisfied that the police are not entitled without statutory authority to commit assaults upon prisoners for the purpose of procuring evidence against them. If the legislature desires that evidence of this kind should be given, it will be quite simple to add a short section to the Code of Criminal Procedure expressly giving power to order such a medical examination."

e 161. S.K. Ghose, J. concurred, at AIR p. 604: (*Bhondar case*⁶⁸)

f "... Nevertheless the examination of an arrested person in hospital by a doctor, not for the benefit of the prisoner's health, but simply by way of a second search, is not provided for by the Code, and in such a case the doctor may not examine the prisoner without his consent. It would be a rule of caution to have such consent noted in the medical report, so that the doctor would be in a position to testify to such consent if called upon to do so."

g A similar conclusion was arrived at by Tarkunde, J. in *Deomam Shami Patel v. State of Maharashtra*⁶⁹, who held that a person suspected or accused of having committed an offence cannot be forcibly subjected to a medical examination. It was also held that if police officers use force for this purpose, then a person can lawfully exercise the right of private defence to offer resistance.

162. It was the 37th and 41st Reports of the Law Commission of India which recommended the insertion of a provision in the Code of Criminal Procedure to enable medical examination without the consent of an accused.

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68 AIR 1931 Cal 601
69 AIR 1959 Bom 284

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These recommendations proved to be the precursor for the inclusion of Sections 53 and 54 in the Code of Criminal Procedure, 1973. It was observed in the 37th Report (December 1967) at pp. 205-06:

"... it will suffice to refer to the decision of the Supreme Court in *Kathi Kalu*⁴⁸, which has the effect of confining the privilege under Article 20(3) to testimony—written or oral. The Supreme Court's judgment in *Kathi Kalu*⁴⁸ should be taken as overruling the view taken in some earlier decisions, invalidating provisions similar to Section 5, Identification of Prisoners Act, 1920.

The position in USA has been summarized (Emerson G. Spies, *Due Process and the American Criminal Trial*⁴⁹).

'Less certain is the protection accorded to the defendant with regard to non-testimonial physical evidence other than personal papers. Can the accused be forced to supply a sample of his blood or urine if the resultant tests are likely to further the prosecution's case? Can he be forced to give his fingerprints to wear a disguise or certain clothing, to supply a pair of shoes which might match footprints at the scene of the crime, to stand in a line up, to submit to a hair cut or to having his hair dyed, or to have his stomach pumped or a fluoroscopic examination of the contents of his intestines? The literature on this aspect of self-incrimination is voluminous.'

The short and reasonably accurate answer to the question posed is that almost all such physical acts can be required. Influenced by the historical development of the doctrine, its purpose, and the need to balance the conflicting interests of the individual and society, the courts have generally restricted the protection of the Fifth Amendment to situations where the defendant would be required to convey ideas, or where the physical acts would offend the decencies of civilised conduct."

(some internal citations omitted)

163. Taking note of *Kathi Kalu Oghad*⁴⁸ and the distinction drawn between testimonial and physical acts in the American cases, the Law Commission observed that a provision for examination of the body would reveal valuable evidence. This view was taken forward in the 41st Report which recommended the inclusion of a specific provision to enable medical examination during the course of investigation, irrespective of the subject's consent. [See *The 41st Report of the Law Commission of India*, Vol. 1 (September 1969), Para 5.1 at p. 37.]

164. We were also alerted to some High Court decisions which have relied on *Kathi Kalu Oghad*⁴⁸ to approve the taking of physical evidence such as blood and hair samples in the course of investigation. Following the overhaul of the Code of Criminal Procedure in 1973, the position became amply clear. In recent years, the judicial power to order a medical examination, albeit in a different context, has been discussed by this Court in *Sharda v. Dharmappa*⁵¹. In that case, the contention related to the validity of a

48 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 1070 38 Australian Law Journal 223, 231 (1964)

71 (2003) 4 SCC 193

a civil court's direction for conducting a medical examination to ascertain the mental state of a party in a divorce proceeding. Needless to say, the mental state of a party was a relevant issue before the trial court, since insanity is a statutory ground for obtaining divorce under the Hindu Marriage Act, 1955. S.B. Sinha, J. held that Article 20(3) was anyway not applicable in a civil proceeding and that the civil court could direct the medical examination in exercise of its inherent powers under Section 151 of the Code of Civil Procedure, since there was no ordinary statutory basis for the same. It was observed: (*Sharda case*⁷¹, SCC pp. 508-09, paras 32-37)

b "32. Yet again the primary duty of a court is to see that truth is arrived at. A party to a civil litigation, it is axiomatic, is not entitled to constitutional protections under Article 20 of the Constitution of India. Thus, the civil court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.

c "33. Discretionary power under Section 151 of the Code of Civil Procedure, it is trite, can be exercised also on an application filed by the party.

d "34. In certain cases medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms.

e "35. Having regard to development in medicinal technology, it is possible to find out that what was presumed to be a mental disorder of a spouse is not really so.

"36. In matrimonial disputes, the court has also a conciliatory role to play— even for the said purpose it may require expert advice.

"37. Under Section 75(e) of the Code of Civil Procedure and Order 26 Rule 10-A the civil court has the requisite power to issue a direction to hold a scientific, technical or expert investigation."

f The decision had also cited some foreign precedents dealing with the authority of investigators and courts to require the collection of DNA samples for the purpose of comparison. In that case the discussion centered on the "right to privacy". So far, the authority of investigators and courts to compel the production of DNA samples has been approved by the Orissa High Court in *Thogorani v. State of Orissa*⁷².

g 165. At this juncture, it should be noted that the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973 was amended in 2005 to clarify the scope of medical examination, especially with regard to the extraction of bodily substances. The amended provision reads:

"53. *Examination of accused by medical practitioner at the request of police officer.*—(1) When a person is arrested on a charge of committing an

h ⁷¹ *Sharda v. Dharmpal*, (2003) 4 SCC 493
⁷² 2004 Cr LJ 4003 (Ori)

offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation.—In this section and in Sections 53-A and 54,—

(a) 'examination' shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) 'registered medical practitioner' means a medical practitioner who possesses any medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register."

(emphasis supplied)

166. The respondents have urged that the impugned techniques should be read into the relevant provisions i.e. Sections 53 and 54 CrPC. As described earlier, a medical examination of an arrested person can be directed during the course of an investigation either at the instance of the investigating officer or the arrested person. It has also been clarified that it is within the powers of a court to direct such a medical examination on its own. Such an examination can also be directed in respect of a person who has been released from custody on bail as well as a person who has been granted anticipatory bail. Furthermore, Section 53 contemplates the use of "force as is reasonably necessary" for conducting a medical examination. This means that once a court has directed the medical examination of a particular person, it is within the powers of the investigators and the examiners to resort to a reasonable degree of physical force for conducting the same.

167. The contentious provision is the Explanation to Section 53 CrPC (amended in 2005) which has been reproduced above. It has been contended that the phrase "modern and scientific techniques including DNA profiling and such other tests" should be liberally construed to include the impugned techniques. It was argued that even though the narcoanalysis technique, polygraph examination and the BEAP test have not been expressly enumerated, they could be read in by examining the legislative intent. Emphasis was placed on the phrase "and such other tests" to argue that Parliament had chosen an approach where the list of "modern and scientific techniques" contemplated was illustrative and not exhaustive. It was also argued that in any case, statutory provisions can be liberally construed in

light of scientific advancements. With the development of newer technologies, their use can be governed by older statutes which had been framed to regulate the older technologies used for similar purposes.

168. On the other hand, the counsel for the appellants have contended that Parliament was well aware of the impugned techniques at the time of the 2005 Amendment and consciously chose not to include them in the amended Explanation to Section 53 CrPC. It was reasoned that this choice recognised the distinction between testimonial acts and physical evidence. While bodily substances such as blood, semen, sputum, sweat, hair and fingernail clippings can be readily characterised as physical evidence, the same cannot be said for the techniques in question. This argument was supported by invoking the rule of "ejusdem generis" which is used in the interpretation of statutes. This rule entails that the meaning of general words which follow specific words in a statutory provision should be construed in light of the commonality between those specific words. In the present case, the substances enumerated are all examples of physical evidence. Hence the words "and such other tests" which appear in the Explanation to Section 53 CrPC should be construed to include the examination of physical evidence but not that of testimonial acts.

169. We are inclined towards the view that the results of the impugned tests should be treated as testimonial acts for the purpose of invoking the right against self-incrimination. Therefore, it would be prudent to state that the phrase "and such other tests" [which appears in the Explanation to Section 53 CrPC] should be read so as to confine its meaning to include only those tests which involve the examination of physical evidence. In pursuance of this line of reasoning, we agree with the appellant's contention about the applicability of the rule of "ejusdem generis". It should also be noted that the Explanation to Section 53 CrPC does not enumerate certain other forms of medical examination that involve testimonial acts, such as psychiatric examination among others. This demonstrates that the amendment to this provision was informed by a rational distinction between the examination of physical substances and testimonial acts.

170. However, the submissions touching on the legislative intent require some reflection. While it is most likely that Parliament was well aware of the impugned techniques at the time of the 2005 Amendment to CrPC and deliberately chose not to enumerate them, we cannot arrive at a conclusive finding on this issue. While it is open to courts to examine the legislative history of a statutory provision, it is not proper for us to try and conclusively ascertain the legislative intent. Such an inquiry is impractical since we do not have access to all the materials which would have been considered by Parliament. In such a scenario, we must address the respondent's arguments about the interpretation of statutes with regard to scientific advancements. To address this aspect, we can refer to some extracts from a leading commentary on the interpretation of statutes [see Justice G.P. Singh, *Principles of Statutory Interpretation*, (10th Edn. 2006) at pp. 239-47]. The learned author has noted, at pp. 240-41:

"Reference to the circumstances existing at the time of the passing of the statute does not, therefore, mean that the language used, at any rate, in a modern statute, should be held to be inapplicable to social, political and economic developments or to scientific inventions not known at the time of the passing of the statute. ... The question again is as to what was the intention of the law-makers: did they intend as originalists may argue, that the words of the statute be given the meaning they would have received immediately after the statute's enactment or did they intend as dynamists may contend that it would be proper for the court to adopt the current meaning of the words? The courts have now generally leaned in favour of dynamic construction. ... But the doctrine has also its limitations. For example it does not mean that the language of an old statute can be construed to embrace something conceptually different.

The guidance on the question as to when an old statute can apply to new state of affairs not in contemplation when the statute was enacted was furnished by Lord Wilberforce in his dissenting speech in *Royal College of Nursing of the United Kingdom v. Deptt. of Health and Social Security*⁷³, which is now treated as authoritative. ... Lord Wilberforce said, at All ER pp. 564-65: (AC p. 822 B-F)

"In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject-matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take under the law of this country; they cannot fill gaps; they cannot by asking the question "What would Parliament have done in this current case—not being one in contemplation—if the facts had been before it?" attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself."

(internal citations omitted)

73 1981 AC 800 : (1981) 2 WLR 279 : (1981) 1 All ER 545 (HL)

SHEVI v. STATE OF KARNATAKA (*Balakrishnan, C.J.*)

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171. The learned author has further taken note of several decisions where general words appearing in statutory provisions have been liberally interpreted to include newer scientific inventions and technologies [*ibid.* at pp. 244-46.] The relevant portion of the commentary quotes Subba Rao, J. in *Senior Electric Inspector v. Laxminarayan Chopra*⁷⁴: (AIR p. 163, para 8)

"8. ... It is perhaps difficult to attribute to a legislative body functioning in a static society that its intention was couched in terms of considerable breadth so as to take within its sweep the future developments comprehended by the phraseology used. It is more reasonable to confine its intention only to the circumstances obtaining at the time the law was made. But in a modern progressive society it would be unreasonable to confine the intention of a legislature to the meaning attributable to the word used at the time the law was made, for a modern legislature making laws to govern a society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them."

172. In light of this discussion, there are some clear obstructions to the dynamic interpretation of the amended Explanation to Section 53 CrPC. Firstly, the general words in question i.e. "and such other tests" should ordinarily be read to include tests which are in the same genus as the other forms of medical examination that have been specified. Since all the explicit references are to the examination of bodily substances, we cannot readily construe the said phrase to include the impugned tests because the latter seem to involve testimonial responses. Secondly, the compulsory administration of the impugned techniques is not the only means for ensuring an expeditious investigation. Furthermore, there is also a safe presumption that Parliament was well aware of the existence of the impugned techniques but deliberately chose not to enumerate them. Hence, on an aggregate understanding of the materials produced before us we lean towards the view that the impugned tests i.e. the narcoanalysis technique, polygraph examination and the BEAP test should not be read into the provisions for "medical examination" under the Code of Criminal Procedure, 1973.

173. However, it must be borne in mind that even though the impugned techniques have not been expressly enumerated in CrPC there is no statutory prohibition against them either. It is a clear case of silence in the law. Furthermore, in circumstances where an individual consents to undergo these tests, there is no dilution of Article 20(3). In the past, the meaning and scope of the term "investigation" has been held to include measures that had not been enumerated in statutory provisions. For example, prior to the enactment of an express provision for medical examination in CrPC, it was observed in

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⁷⁴ AIR 1962 SC 159

*Mahipal Maderna v. State of Rajasthan*⁷⁵, that an order requiring the production of a hair sample comes within the ordinary understanding of "investigation" (at Cri LJ pp. 1409-10, para 17).

174. We must also take note of the decision in *Janished v. State of U.P.*⁷⁶, wherein it was held that a blood sample can be compulsorily extracted during a "medical examination" conducted under Section 53 CrPC. At that time, the collection of blood samples was not expressly contemplated in the said provision. Nevertheless, the Court had ruled that the phrase "examination of a person" should be read liberally so as to include an examination of what is externally visible on a body as well as the examination of an organ inside the body (see Cri LJ p. 1689, para 13).

175. We must also refer back to the substance of the decision in *Sharda v. Dharmpal*⁷¹ which upheld the authority of a civil court to order a medical examination in exercise of the inherent powers vested in it by Section 151 of the Code of Civil Procedure, 1908. The same reasoning cannot be readily applied in the criminal context. Despite the absence of a statutory basis, it is tenable to hold that criminal courts should be allowed to direct the impugned tests with the subject's consent, keeping in mind that there is no statutory prohibition against them either.

176. Another pertinent contention raised by the appellants is that the involvement of medical personnel in the compulsory administration of the impugned tests is violative of their professional ethics. In particular, criticism was directed against the involvement of doctors in the narcoanalysis technique and it was urged that since the content of the drug-induced revelations were shared with investigators, this technique breaches the duty of confidentiality which should be ordinarily maintained by medical practitioners. [See generally Amar Jesani, "Willing Participants and Tolerant Profession: Medical Ethics and Human Rights in Narcoanalysis", *Indian Journal of Medical Ethics*, Vol. 16(3), July-September 2008.]

177. The counsel have also cited the text of the "Principles of Medical Ethics" adopted by the United Nations General Assembly [GA Res. 37/194, 111th Plenary Meeting] on 18-12-1982. This document enumerates some "Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment or punishment". Emphasis was placed on Principle 4 which reads:

"Principle 4

It is a contravention of medical ethics for health personnel, particularly physicians:

To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or

75 1971 Cri LJ 1405 (Raj)

76 1976 Cri LJ 1680 (All)

71 (2003) 4 SCC 493

detainees and which is not in accordance with the relevant international instruments.”.

- a 178. Being a court of law, we do not have the expertise to mould the specifics of professional ethics for the medical profession. Furthermore, the involvement of doctors in the course of investigation in criminal cases has long been recognised as an exception to the physician-patient privilege. In the Indian context, the statutory provisions for directing a medical examination are an example of the same. Fields such as forensic toxicology
- b have become important in criminal justice systems all over the world and doctors are frequently called on to examine bodily substances such as samples of blood, hair, semen, saliva, sweat, sputum and fingernail clippings as well as marks, wounds and other physical characteristics. A reasonable limitation on the forensic uses of medical expertise is the fact that testimonial acts such as the results of a psychiatric examination cannot be used as
- c evidence without the subject's informed consent.

Results of the impugned tests should be treated as “personal testimony”

179. We now return to the operative question of whether the results obtained through polygraph examination and the BEAP test should be treated as testimonial responses. Ordinarily evidence is classified into three broad categories, namely, oral testimony, documents and material evidence. The
- d protective scope of Article 20(3) read with Section 161(2) CrPC guards against the compulsory extraction of oral testimony, even at the stage of investigation. With respect to the production of documents, the applicability of Article 20(3) is decided by the trial Judge but parties are obliged to produce documents in the first place. However, the compulsory extraction of material (or physical) evidence lies outside the protective scope of Article
- e 20(3). Furthermore, even testimony in oral or written form can be required under compulsion if it is to be used for the purpose of identification or comparison with materials and information that is already in the possession of investigators.

180. We have already stated that the narcoanalysis test includes substantial reliance on verbal statements by the test subject and hence its
- f involuntary administration offends the “right against self-incrimination”. The crucial test laid down in *Kathi Kalu Oghad*⁴⁸ is that of

“imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation” (*ibid.* at SCR p. 30.).

- g The difficulty arises since the majority opinion in that case appears to confine the understanding of “personal testimony” to the conveyance of personal knowledge through oral statements or statements in writing. The results obtained from polygraph examination or a BEAP test are not in the nature of oral or written statements. Instead, inferences are drawn from the measurement of physiological responses recorded during the performance of
- h these tests. It could also be argued that tests such as polygraph examination

⁴⁸ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10

and the BEAP test do not involve a "positive volitional act" on part of the test subject and hence their results should not be treated as testimony. However, this does not entail that the results of these two tests should be likened to physical evidence and thereby excluded from the protective scope of Article 20(3). a

181. We must refer back to the substance of the decision in *Kathi Kalu Oghad*⁴⁸ which equated a testimonial act with the imparting of knowledge by a person who has personal knowledge of the facts that are in issue. It has been recognised in other decisions that such personal knowledge about relevant facts can also be communicated through means other than oral or written statements. For example in *M.P. Sharma case*⁵⁵, it was noted that "...evidence can be furnished through the lips or by production of a thing or of a document or in other modes." (*ibid.* at SCR p. 1087) Furthermore, common sense dictates that certain communicative gestures such as pointing or nodding can also convey personal knowledge about a relevant fact, without offering a verbal response. It is quite foreseeable that such a communicative gesture may by itself expose a person to "criminal charges or penalties" or furnish a link in the chain of evidence needed for prosecution. b c

182. We must also highlight that there is nothing to show that the learned Judges in *Kathi Kalu Oghad*⁴⁸ had contemplated the impugned techniques while discussing the scope of the phrase "to be a witness" for the purpose of Article 20(3). At that time, the transmission of knowledge through means other than speech or writing was not something that could have been easily conceived of. Techniques such as polygraph examination were fairly obscure and were the subject of experimentation in some western nations while the BEAP technique was developed several years later. Just as the interpretation of statutes has to be often re-examined in light of scientific advancements, we should also be willing to re-examine judicial observations with a progressive lens. d e

183. An explicit reference to the lie detector tests was of course made by the US Supreme Court in *Schmerber*⁶⁴ decision, wherein Brennan, J. had observed at US p. 764: (L Ed p. 916)

"... To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment." f

184. Even though the actual process of undergoing a polygraph examination or a BEAP test is not the same as that of making an oral or written statement, the consequences are similar. By making inferences from the results of these tests, the examiner is able to derive knowledge from the subject's mind which otherwise would not have become available to the investigators. These two tests are different from medical examination and the g

48 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 10
55 *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cr LJ 865 : 1954 SCR 1077
64 *Schmerber v. California*, 161, Ed 2d 908 : 384 US 757 (1965) h

a analysis of bodily substances such as blood, semen and hair samples, since the test subject's physiological responses are directly correlated to mental faculties. Through lie detection or gauging a subject's familiarity with the stimuli, personal knowledge is conveyed in respect of a relevant fact. It is also significant that unlike the case of documents, the investigators cannot possibly have any prior knowledge of the test subject's thoughts and memories, either in the actual or constructive sense. Therefore, even if a highly strained analogy were to be made between the results obtained from the impugned tests and the production of documents, the weight of precedents leans towards restrictions on the extraction of "personal knowledge" through such means.

b 185. During the administration of a polygraph test or a BEAP test, the subject makes a mental effort which is accompanied by certain physiological responses. The measurement of these responses then becomes the basis of the transmission of knowledge to the investigators. This knowledge may aid an ongoing investigation or lead to the discovery of fresh evidence which could then be used to prosecute the test subject. In any case, the compulsory administration of the impugned tests impedes the subject's right to choose between remaining silent and offering substantive information. The requirement of a "positive volitional act" becomes irrelevant since the subject is compelled to convey personal knowledge irrespective of his/her own volition.

c 186. Some academics have also argued that the results obtained from tests such as polygraph examination are "testimonial" acts that should come within the prohibition of the right against self-incrimination. For instance, Michael S. Pardo (2008) has observed [cited from Michael S. Pardo, "Self-Incrimination and the Epistemology of Testimony"⁶⁶, *Cardozo Law Review* at p. 1046]:

d "The results of polygraphs and other lie detection tests, whether they call for a voluntary response or not, are testimonial because the tests are just inductive evidence of the defendant's epistemic state. They are evidence that purports to tell us either: (1) that we can or cannot rely on the assertions made by the defendant and for which he has represented himself to be an authority, or (2) what propositions the defendant would assume authority for and would invite reliance upon, were he to testify truthfully."

e 187. Ronald J. Allen and M. Kristin Mace (2004) have offered a theory that the right against self-incrimination is meant to protect an individual in a situation where the State places reliance on the "substantive results of cognition". The following definition of "cognition" has been articulated to explain this position [cited from Ronald J. Allen and M. Kristin Mace, "The Self-Incrimination Clause Explained and its Future Predicted"⁷⁷, *Journal of Criminal Law and Criminology*, Fn. 16 at p. 247]:

f "... 'cognition' is used herein to refer to these intellectual processes that allow one to gain and make use of substantive knowledge and to

g h 66 30 *Cardozo Law Review* 1023-46 (December 2008)

77 94 *Journal of Criminal Law and Criminology* 243-293 (2004)

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compare one's 'inner world' (previous knowledge) with the 'outside world' (stimuli such as questions from an interrogator). Excluded are simple psychological responses to stimuli such as fear, warmth, and hunger: the mental processes that produce muscular movements; and one's will or faculty for choice. ..." (internal citations omitted)

The abovementioned authors have taken a hypothetical example where the inferences drawn from an involuntary polygraph test that did not require verbal answers, led to the discovery of incriminating evidence. They have argued that if the scope of the Fifth Amendment extends to protecting the subject in respect of "substantive results of cognition", then reliance on polygraph test results would violate the said right.

188. A similar conclusion has also been made by the National Human Rights Commission, as is evident from the following extract in the *Guidelines Relating to Administration of Polygraph Test (Lie Detector Test) on an Accused (2000)*:

"The extent and nature of the 'self-incrimination' is wide enough to cover the kinds of statements that were sought to be induced. In *M.P. Sharma*⁵⁵ the Supreme Court included within the protection of the self-incrimination rule all positive volitional acts which furnish evidence. This by itself would have made all or any interrogation impossible. The test—as stated in *Kathi Kalu Oghad*⁵⁶—retains the requirement of personal volition and states that 'self-incrimination' must mean conveying information based upon the personal knowledge of the person giving information. By either test, the information sought to be elicited in a lie detector test is information in the personal knowledge of the accused."

189. In light of the preceding discussion, we are of the view that the results obtained from tests such as polygraph examination and the BEAP test should also be treated as "personal testimony", since they are a means for "imparting personal knowledge about relevant facts". Hence, our conclusion is that the results obtained through the involuntary administration of either of the impugned tests (i.e. the narcoanalysis technique, polygraph examination and the BEAP test) come within the scope of "testimonial compulsion", thereby attracting the protective shield of Article 20(3).

II. Whether the involuntary administration of the impugned techniques is a reasonable restriction on "personal liberty" as understood in the context of Article 21 of the Constitution?

190. The preceding discussion does not conclusively address the contentions before us. Article 20(3) protects a person who is "formally accused" of having committed an offence or even a suspect or a witness who is questioned during an investigation in a criminal case. However, Article 20(3) is not applicable when a person gives his/her informed consent to undergo any of the impugned tests. It has also been described earlier that the

⁵⁵ *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077

⁵⁶ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10

- a "right against self-incrimination" does not protect persons who may be compelled to undergo the tests in the course of administrative proceedings or any other proceedings which may result in civil liability. It is also conceivable that a person who is forced to undergo these tests may not subsequently face criminal charges. In this context, Article 20(3) will not apply in situations where the test results could become the basis of non-penal consequences for the subject such as custodial abuse, police surveillance and harassment among others.
- b 191. In order to account for these possibilities, we must examine whether the involuntary administration of any of these tests is compatible with the constitutional guarantee of "substantive due process". The standard of "substantive due process" is of course the threshold for examining the validity of all categories of governmental action that tend to infringe upon the idea of "personal liberty". We will proceed with this inquiry with regard to
- c the various dimensions of "personal liberty" as understood in the context of Article 21 of the Constitution, which lays down that:
- "21. *Protection of life and personal liberty.*—No person shall be deprived of his life or personal liberty except according to procedure established by law."
- d 192. Since administering the impugned tests entails the physical confinement of the subject, it is important to consider whether they can be read into an existing statutory provision. This is so because any form of restraint on personal liberty, howsoever slight it may be, must have a basis in law. However, we have already explained how it would not be prudent to read the Explanation to Section 53 CrPC in an expansive manner so as to include the impugned techniques. The second line of inquiry is whether the
- e involuntary administration of these tests offends certain rights that have been read into Article 21 by way of judicial precedents. The contentions before us have touched on aspects such as the "right to privacy" and the "right against cruel, inhuman and degrading treatment". The third line of inquiry is structured around the right to fair trial which is an essential component of "personal liberty".
- f 193. There are several ways in which the involuntary administration of either of the impugned tests could be viewed as a restraint on "personal liberty". The most obvious indicator of restraint is the use of physical force to ensure that an unwilling person is confined to the premises where the tests are to be conducted. Furthermore, the drug-induced revelations or the substantive inferences drawn from the measurement of the subject's
- g physiological responses can be described as an intrusion into the subject's mental privacy. It is also quite conceivable that a person could make an incriminating statement on being threatened with the prospective administration of any of these techniques. Conversely, a person who has been forcibly subjected to these techniques could be confronted with the results in a subsequent interrogation, thereby eliciting incriminating statements.
- h 194. We must also account for circumstances where a person who undergoes the said tests is subsequently exposed to harmful consequences, though not of a penal nature. We have already expressed our concern with

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situations where the contents of the test results could prompt investigators to engage in custodial abuse, surveillance or undue harassment. We have also been apprised of some instances where the investigating agencies have leaked the video recordings of narcoanalysis interviews to media organisations. This is an especially worrisome practice since the public distribution of these recordings can expose the subject to undue social stigma and specific risks. It may even encourage acts of vigilantism in addition to a "trial by media".

195. We must remember that the law does provide for some restrictions on "personal liberty" in the routine exercise of police powers. For instance, CrPC incorporates an elaborate scheme prescribing the powers of arrest, detention, interrogation, search and seizure. A fundamental premise of the criminal justice system is that the police and the judiciary are empowered to exercise a reasonable degree of coercive powers. Hence, the provision that enables courts to order a person who is under arrest to undergo a medical examination also provides for the use of "force as is reasonably necessary" for this purpose. It is evident that the notion of "personal liberty" does not grant rights in the absolute sense and the validity of restrictions placed on the same needs to be evaluated on the basis of criterion such as "fairness, non-arbitrariness and reasonableness".

196. Both the appellants and the respondents have cited cases involving the compelled extraction of blood samples in a variety of settings. An analogy has been drawn between the pinprick of a needle for extracting a blood sample and the intravenous administration of drugs such as sodium pentothal. Even though the extracted sample of blood is purely physical evidence as opposed to a narcoanalysis interview where the test subject offers testimonial responses, the comparison can be sustained to examine whether puncturing the skin with a needle or an injection is an unreasonable restraint on "personal liberty".

197. The decision given by the US Supreme Court in *Rochin v. California*⁵¹, recognised the threshold of "conduct that shocks the conscience" for deciding when the extraction of physical evidence offends the guarantee of "due process of law". With regard to the facts in that case, Felix Frankfurter, J. had decided that the extraction of evidence had indeed violated the same, *ibid.* at US pp. 172-73: (L. *Id* pp. 190-91)

"... we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of Government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation. ... Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability.

54 96 L. *Id* 183 : 342 US 165 (1951)

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a They are inadmissible under the due process clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalise the temper of a society."

b 198. Coming to the cases cited before us, in *State of Maharashtra v. Sheshappa Dudhappa Tambade*⁷⁸, the Bombay High Court had upheld the constitutionality of Section 129-A of the Bombay Prohibition Act, 1949. This provision empowered the Prohibition Officers and police personnel to produce a person for "medical examination", which could include the collection of a blood sample. The said provision authorised the use of "all means reasonably necessary to secure the production of such person or the examination of his body or the collection of blood necessary for the test".
c Evidently, the intent behind this provision was to enforce the policy of prohibition on the consumption of intoxicating liquors. Among other questions, the Court also ruled that this provision did not violate Article 21.

d 199. Reliance was placed on a decision of the US Supreme Court in *Breithaupt v. Abram*⁷⁹, wherein the contentious issue was whether a conviction on the basis of an involuntary blood test violated the guarantee of "due process of law". In deciding that the involuntary extraction of the blood sample did not violate the guarantee of "due process of law", Clark, J. observed at US pp. 435-37: (1. Id pp. 451-52)

e "... there is nothing 'brutal' or 'offensive' in the taking of a blood sample when done, as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; and certainly the test was administered here would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of
f the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally
g millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors. Likewise, we note that a majority of our States have either enacted statutes in some form authorising tests of this nature or permit findings so obtained to be admitted in evidence. We therefore conclude that a blood test taken by a skilled technician is not

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⁷⁸ AIR 1964 Bom 253

⁷⁹ 11.1d 2d 448 ; 352 US 432 (1956)

such 'conduct that shocks the conscience', (*Rochin v. California*⁵⁴, US at p. 172), nor such a method of obtaining evidence that it offends a 'sense of justice', (*Brown v. Mississippi*⁸⁰, US at p. 286)."

200. In *Jamshed v. State of U.P.*⁷⁶, the following observations were made in respect of compulsory extraction of blood samples during a medical examination: (Cri LJ p. 1689, para 12)

"12. ... We are therefore of the view that there is nothing repulsive or shocking to conscience in taking the blood of the appellant in the instant case in order to establish his guilt. So far as the question of causing hurt is concerned, even causing of some pain may technically amount to hurt as defined by Section 319 of the Penal Code. But pain might be caused even if the accused is subjected to a forcible medical examination. For example, in cases of rape it may be necessary to examine the private parts of the culprit. If a culprit is suspected to have swallowed some stolen article, an emetic may be used and x-ray examination may also be necessary. For such purposes the law permits the use of necessary force. It cannot, therefore, be said that merely because some pain is caused, such a procedure should not be permitted."

201. A similar view was taken in *Ananth Kumar Naik v. State of A.P.*⁸¹, where it was held: (Cri LJ p. 1800, para 20)

"20. ... In fact Section 53 provides that while making such an examination such force as is reasonably necessary for that purpose may be used. Therefore, whatever discomfort that may be caused when samples of blood and semen are taken from an arrested person it is justified by the provisions of Sections 53 and 54 CrPC."

202. We can also refer to the following observations in *Anil Anantrao Lokhande v. State of Maharashtra*⁸²: (Cri LJ p. 138, para 30)

"30. ... Once it is held that Section 53 of the Code of Criminal Procedure does confer a right upon the investigating machinery to get the arrested persons medically examined by the medical practitioner and the expression used in Section 53 includes in its import the taking of sample of the blood for analysis, then obviously the said provision is not violative of the guarantee incorporated in Article 21 of the Constitution of India."

203. This line of precedents shows that the compelled extraction of blood samples in the course of a medical examination does not amount to "conduct that shocks the conscience". There is also an endorsement of the view that the use of "force as may be reasonably necessary" is mandated by law and hence it meets the threshold of "procedure established by law". In this light, we must restate two crucial considerations that are relevant for the case

54 361 F.2d 183 : 342 US 165 (1951)

80 80 L.Ed.682 : 297 US 278 (1935)

76 1976 Cri LJ 1680 (All)

81 1977 Cri LJ 1797 (AP)

82 1981 Cri LJ 125 (Bom)

- a before us. Firstly, the restrictions placed on "personal liberty" in the course of administering the impugned techniques are not limited to physical confinement and the extraction of bodily substances. All the three techniques in question also involve testimonial responses. Secondly, most of the abovementioned cases were decided in accordance with the threshold of "procedure established by law" for restraining "personal liberty". However, in this case we must use a broader standard of reasonableness to evaluate the validity of the techniques in question. This wider inquiry calls for deciding whether they are compatible with the various judicially recognised dimensions of "personal liberty" such as the right to privacy, the right against cruel, inhuman or degrading treatment and the right to fair trial.

Applicability of the "right to privacy"

- c 204. In *Sharda v. Dharmpal*⁷¹, this Court had upheld the power of a civil court to order the medical examination of a party to a divorce proceeding. In that case, the medical examination was considered necessary for ascertaining the mental condition of one of the parties and it was held that a civil court could direct the same in the exercise of its inherent powers despite the absence of an enabling provision. In arriving at this decision it was also considered whether subjecting a person to a medical examination would violate Article 21. We must highlight the fact that a medical test for ascertaining the mental condition of a person is most likely to be in the nature of a psychiatric evaluation which usually includes testimonial responses. Accordingly, a significant part of that judgment dealt with the "right to privacy". It would be appropriate to structure the present discussion around extracts from that opinion.

- e 205. In *M.P. Sharma*⁵⁵ it had been noted that the Indian Constitution did not explicitly include a "right to privacy" in a manner akin to the Fourth Amendment of the US Constitution. In that case, this distinction was one of the reasons for upholding the validity of search warrants issued for documents required to investigate charges of misappropriation and embezzlement.

- f 206. Similar issues were discussed in *Kharak Singh v. State of U.P.*⁸³, where the Court considered the validity of the Police Regulations that authorised police personnel to maintain lists of "history-sheeters" in addition to conducting surveillance activities, domiciliary visits and periodic inquiries about such persons. The intention was to monitor persons suspected or charged with offences in the past, with the aim of preventing criminal acts in the future. At the time, there was no statutory basis for these Regulations and they had been framed in the exercise of administrative functions. The majority opinion (Ayyangar, J.) held that these Regulations did not violate "personal liberty", except for those which permitted domiciliary visits. The

h 71 (2003) 4 SCC 493

55 *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 : 1954 Cr LJ 865 : 1954 SCR 1077

83 AIR 1963 SC 1295 : (1963) 2 Cr LJ 329

other restraints such as surveillance activities and periodic inquiries about "history-sheets" were justified by observing: (AIR p. 1303, para 20)

"20. ... the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III."

207. Ayyangar, J. distinguished between surveillance activities conducted in the routine exercise of police powers and the specific act of unauthorised intrusion into a person's home which violated "personal liberty". However, the minority opinion (Subba Rao, J.) in *Kharak Singh*⁸³ took a different approach by recognising the interrelationship between Articles 21 and 19, thereby requiring the State to demonstrate the "reasonableness" of placing such restrictions on "personal liberty". (This approach was later endorsed by Bhagwati, J. in *Maneka Gandhi v. Union of India*⁸², see AIR p. 622.) Subba Rao, J. held that the right to privacy "is an essential ingredient of personal liberty" and that the right to "personal liberty" is "a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures". (AIR at p. 1306, para 31)

208. In *Gobind v. State of M.P.*⁸⁴, the Supreme Court approved of some Police Regulations that provided for surveillance activities, but this time the decision pointed out a clear statutory basis for these Regulations. However, it was also ruled that the "right to privacy" was not an absolute right. It was held:

"28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterise as a fundamental right, we do not think that the right is absolute. (SCC p. 157, para 28)

* * *

31. ... Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. (SCC p. 157, para 31)"

209. Following the judicial expansion of the idea of "personal liberty", the status of the "right to privacy" as a component of Article 21 has been recognised and reinforced. In *R. Rajagopal v. State of T.N.*⁸⁵, this Court dealt with a fact situation where a convict intended to publish his autobiography which described the involvement of some politicians and businessmen in

⁸³ *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cr L.J. 329

⁴² (1978) 1 SCC 248

⁸⁴ (1975) 2 SCC 148 : 1975 SCC (Cr) 468

⁸⁵ (1994) 6 SCC 632

- illegal activities. Since the publication of this work was challenged on grounds such as the invasion of privacy among others, the Court ruled on the said issue. It was held that the right to privacy could be described as the
- a "right to be let alone and a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among others. No one can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical". However, it was also ruled that exceptions may be
 - b made if a person voluntarily thrusts himself into a controversy or any of these matters becomes part of public records or relates to an action of a public official concerning the discharge of his official duties.

210. In *People's Union for Civil Liberties v. Union of India*⁸⁶, it was held that the unauthorised tapping of telephones by the police personnel violated the "right to privacy" as contemplated under Article 21. However, it was not
- c stated that telephone tapping by the police was absolutely prohibited, presumably because the same may be necessary in some circumstances to prevent criminal acts and in the course of investigation. Hence, such intrusive practices are permissible if done under a proper legislative mandate that regulates their use. This intended balance between an individual's "right to privacy" and "compelling public interest" has frequently occupied judicial
 - d attention. Such a compelling public interest can be identified with the need to prevent crimes and expedite investigations or to protect public health or morality.

211. For example, in *'X' v. Hospital 'Z'*⁸⁷, it was held that a person could not invoke his "right to privacy" to prevent a doctor from disclosing his HIV positive status to others. It was ruled that in respect of HIV positive persons,
- e the duty of confidentiality between the doctor and patient could be compromised in order to protect the health of other individuals. With respect to the facts in that case, Saghir Ahmad, J. held: (SCC p. 307, para 29)

- ... When a patient was found to be HIV (+), its disclosure by the doctor could not be violative of either the rule of confidentiality or the
- f patient's right of privacy as the lady with whom the patient was likely to be married was saved in time by such disclosure, or else, she too would have been infected with a dreadful disease if marriage had taken place and been consummated.

212. However, a three-Judge Bench partly overruled this decision in a review petition. In *'X' v. Hospital 'Z'*⁸⁸, it was held that if an HIV positive person contracted marriage with a willing partner, then the same would not
- g constitute the offences defined by Sections 269 and 270 of the Penal Code. [Section 269 IPC defines the offence of a "negligent act likely to spread infection of disease dangerous to life" and Section 270 contemplates a "malignant act likely to spread infection of disease dangerous to life".]

- h 86 (1997) 1 SCC 301 : AIR 1997 SC 568
87 (1998) 8 SCC 296
88 (2003) 1 SCC 500

213. A similar question was addressed by the Andhra Pradesh High Court in *M. Vijaya v. Singareni Collieries Co. Ltd.*⁸⁹: (AIR pp. 513-14, para 52)

"52. There is an apparent conflict between the right to privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the State to identify HIV infected persons for the purpose of stopping further transmission of the virus. In the interests of the general public, it is necessary for the State to identify HIV positive cases and any action taken in that regard cannot be termed as unconstitutional as under Article 47 of the Constitution, the State was under an obligation to take all steps for the improvement of the public health. A law designed to achieve this object, if fair and reasonable, in our opinion, will not be in breach of Article 21 of the Constitution of India."

214. The discussion on the "right to privacy" in *Sharda v. Dharmpal*⁷¹ also cited a decision of the Court of Appeal (in UK) in *R.(S) v. Chief Constable of the South Yorkshire Police*⁹⁰. The contentious issues arose in respect of the retention of fingerprints and DNA samples taken from persons who had been suspected of having committed offences in the past but were not convicted for them. It was argued that this policy violated Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (hereinafter "ECHR"). Article 8 deals with the "right to respect for private and family life" while Article 14 lays down the scope of the "prohibition of discrimination".

215. For the present discussion, it will be useful to examine the language of Article 8 of the ECHR:

"8. *Right to respect for private and family life.*—(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

216. In *South Yorkshire Police case*⁹⁰, a distinction was drawn between the "taking", "retention" and "use" of fingerprints and DNA samples. While the "taking" of such samples from individual suspects could be described as a reasonable measure in the course of routine police functions, the controversy arose with respect to the "retention" of samples taken from individuals who had been suspected of having committing offences in the past but had not been convicted for them. The statutory basis for the retention of physical samples taken from suspects was Section 64(1-A) of the Police and Criminal Evidence Act, 1984. This provision also laid down that these samples could

⁸⁹ AIR 2001 AP 502

⁷¹ (2003) 4 SCC 493

⁹⁰ (2002) 1 W.L.R. 3223 : (2003) 1 All ER 148 (CA)

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- only be used for purposes related to the "prevention or detection of crime, the investigation of an offence or the conduct of a prosecution". This section had
- a been amended to alter the older position which provided that physical samples taken from suspects were meant to be destroyed once the suspect was cleared of the charges or acquitted. As per the older position, it was only the physical samples taken from the convicted persons which could be retained by the police authorities. It was contended that the amended provision was incompatible with Articles 8 and 14 of the ECHR and hence
 - b the relief sought was that the fingerprints and DNA samples of the parties concerned should be destroyed.

217. In response to these contentions, the majority (Lord Woolf, C.J.) held that although the retention of such material interfered with the Article 8(1) rights of the individuals ("right to respect for private and family life") from whom it had been taken, that interference was justified by Article 8(2).
- c It was further reasoned that the purpose of the impugned amendment, the language of which was very similar to Article 8(2) was obvious and lawful. Nor were the adverse consequences to the individual disproportionate to the benefit to the public. It was held: (*South Yorkshire Police case*⁹⁰, WLR p. 3230, para 17)

- d "17. So far as the prevention and detection of crime is concerned, it is obvious the larger the databank of fingerprints and DNA samples available to the police, the greater the value of the databank will be in preventing crime and detecting those responsible for crime. There can be no doubt that if every member of the public was required to provide fingerprints and a DNA sample this would make a dramatic contribution to the prevention and detection of crime. To take but one example,
- e the great majority of rapists who are not known already to their victim would be able to be identified. However, PACI does not contain blanket provisions either as to the taking, the retention, or the use of fingerprints or samples; Parliament has decided upon a balanced approach."

- f 218. Lord Woolf, C.J. also referred to the following observations made by Lord Steyn in an earlier decision of the House of Lords, which was reported as *Attorney General's Reference (No. 3 of 1999)*⁹¹, All ER at p. 584g-j: (AC p. 118 E-F)

- g "... It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

- h 90 *R(5) v. Chief Constable of the South Yorkshire Police*, (2002) 1 WLR 3223 : (2003) 1 All ER 148 (CA)
- 91 (2001) 2 AC 91 : (2001) 2 WLR 56 : (2001) 1 All ER 577 (HL.)

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219. On the question of whether the retention of material samples collected from suspects who had not been convicted was violative of the "prohibition against discrimination" under Article 14 of the ECHR, it was observed All ER at p. 162: (*South Yorkshire Police case*⁹⁰, WLR p. 3238, para 46) a

"46. In the present circumstances when an offence is being investigated or is the subject of a charge it is accepted that fingerprints and samples may be taken. Where they have not been taken before any question of the retention arises they have to be taken so there would be the additional interference with their rights which the taking involves. As no harmful consequences will flow from the retention unless the fingerprints or sample match those of someone alleged to be responsible for an offence the different treatment is fully justified." b

220. In the present case, written submissions made on behalf of the respondents have tried to liken the compulsory administration of the impugned techniques with the DNA profiling technique. In light of this attempted analogy, we must stress that the DNA profiling technique has been expressly included among the various forms of medical examination in the amended Explanation to Section 53 CrPC. It must also be clarified that a "DNA profile" is different from a DNA sample which can be obtained from bodily substances. A DNA profile is a record created on the basis of DNA samples made available to the forensic experts. Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can be readily matched with existing profiles that are already in the possession of law-enforcement agencies. The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts. c

221. It may also be recalled that as per the majority decision in *Kathi Kalu Oghad*¹⁸ the use of material samples such as fingerprints for the purpose of comparison and identification does not amount to a testimonial act for the purpose of Article 20(3). Hence, the taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian context. However, if the DNA profiling technique is further developed and used for testimonial purposes, then such uses in the future could face challenges in the judicial domain. d

222. The judgment delivered in *Sharda v. Dharmpal*¹¹, had surveyed the abovementioned decisions to conclude that a person's right to privacy could be justifiably curtailed if it was done in light of competing interests. Reference was also made to some statutes that permitted the compulsory administration of medical tests. For instance, it was observed: (SCC p. 514, paras 61-62) e

"61. Having outlined the law relating to privacy in India, it is relevant in this context to notice that certain laws have been enacted by the Indian f

90 *R.(S) v. Chief Constable of the South Yorkshire Police*, (2002) 1 WLR 3223 : (2003) 1 All ER 148 (CA) g

48 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 : (1961) 2 Cr LJ 856 : (1962) 3 SCR 1071 (2003) 4 SCC 493 h

Parliament where the accused may be subjected to certain medical or other tests.

a 62. By way of example, we may refer to Sections 185, 202, 203 and 204 of the Motor Vehicles Act, Sections 53 and 54 of the Code of Criminal Procedure and Section 3 of the Identification of Prisoners Act, 1920. Reference in this connection may also be made to Sections 269 and 270 of the Penal Code. Constitutionality of these laws, if challenge is thrown, may be upheld."

b 223. However, it is important for us to distinguish between the considerations that occupied this Court's attention in *Sharda v. Dharmpal*⁷¹ and the ones that we are facing in the present case. It is self-evident that the decision did not dwell on the distinction between medical tests whose results are based on testimonial responses and those tests whose results are based on the analysis of physical characteristics and bodily substances. It can be safely
c stated that the Court did not touch on the distinction between testimonial acts and physical evidence, simply because Article 20(3) is not applicable to a proceeding of a civil nature.

d 224. Moreover, a distinction must be made between the character of restraints placed on the right to privacy. While the ordinary exercise of police powers contemplates restraints of a physical nature such as the extraction of bodily substances and the use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to the forcible extraction of testimonial responses. In conceptualising the "right to privacy" we must highlight the distinction between privacy in a physical sense and the privacy of one's mental processes.

e 225. So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person "to impart
f personal knowledge about a relevant fact". The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of "personal liberty" under Article 21. Hence, our understanding of the "right to privacy" should account for its intersection with Article 20(3). Furthermore, the "rule against involuntary confessions" as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to
g serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there
h should be no scope for any other individual to interfere with such autonomy,

especially in circumstances where the person faces exposure to criminal charges or penalties.

226. Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the "right against self-incrimination". However, this determination does not account for circumstances where a person could be subjected to any of the impugned tests but not exposed to criminal charges and the possibility of conviction. In such cases, he/she could still face adverse consequences such as custodial abuse, surveillance, undue harassment and social stigma among others. In order to address such circumstances, it is important to examine some other dimensions of Article 21.

Safeguarding the "right against cruel, inhuman or degrading treatment"

227. We will now examine whether the act of forcibly subjecting a person to any of the impugned techniques constitutes "cruel, inhuman or degrading treatment", when considered by itself. This inquiry will account for the permissibility of these techniques in all settings, including those where a person may not be subsequently prosecuted but could face adverse consequences of a non-penal nature. The appellants have contended that the use of the impugned techniques amounts to "cruel, inhuman or degrading treatment".

228. Even though the Indian Constitution does not explicitly enumerate a protection against "cruel, inhuman or degrading punishment or treatment" in a manner akin to the Eighth Amendment of the US Constitution, this Court has discussed this aspect in several cases. For example, in *Sunil Batra v. Delhi Admn.*⁶³, V.R. Krishna Iyer, J. observed: (SCC pp. 518-19, para 52)

"52. True, our Constitution has no 'due process' clause or the Eighth Amendment; but, in this branch of law, after *Cooper*⁹² and *Maneka Gandhi*⁹³ the consequence is the same. For what is punitively outrageous, scandalisingly unusual or cruel and rehabilitatively counterproductive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21. Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority. *Is a person under death sentence or undertrial unilaterally dubbed dangerous liable to suffer extra torment too deep for tears?* Emphatically no, lest social justice, dignity of the individual, equality before the law, procedure established by law and the seven lamps of freedom (Article 19) become chimerical constitutional claptrap. Judges,

63 (1978) 4 SCC 494 : 1979 SCC (Cri) 155

92 *Rustom Cavasjee Cooper v. Union of India*, (1970) 1 SCC 248

93 *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

a even within a prison setting, are the real, though restricted, ombudsmen empowered to proscribe and prescribe, humanise and civilise the lifestyle within the *carcers*. The operation of Articles 14, 19 and 21 may be pared down for a prisoner but not puffed out altogether." (emphasis in original)

b 229. In *Sunil Batra case*⁶³ this Court had disapproved of practices such as solitary confinement and the use of bar fetters in prisons. It was held that the prisoners were also entitled to "personal liberty" though in a limited sense, and hence Judges could enquire into the reasonableness of their treatment by the prison authorities. Even though "the right against cruel, inhuman and degrading punishment" cannot be asserted in an absolute sense, there is a sufficient basis to show that Article 21 can be invoked to protect the "bodily integrity and dignity" of persons who are in custodial environments. This protection extends not only to prisoners who are convicts and undertrials, but also to those persons who may be arrested or detained in the course of investigations in criminal cases.

c 230. Judgments such as *D.K. Basu v. State of W.B.*⁹³, have stressed upon the importance of preventing the "cruel, inhuman or degrading treatment" of any person who is taken into custody. In respect of the present case, any person who is forcibly subjected to the impugned tests in the environs of a forensic laboratory or a hospital would be effectively in a custodial environment for the same. The presumption of the person being in a custodial environment will apply irrespective of whether he/she has been formally accused or is a suspect or a witness. Even if there is no overbearing police presence, the fact of physical confinement and the involuntary administration of the tests is sufficient to constitute a custodial environment for the purpose of attracting Article 20(3) and Article 21. It was necessary to clarify this aspect because we are aware of certain instances where persons are questioned in the course of investigations without being brought on the record as witnesses. Such omissions on the part of the investigating agencies should not be allowed to become a ground for denying the protections that are available to a person in custody.

f 231. The appellants have also drawn our attention to some international conventions and declarations. For instance in the Universal Declaration of Human Rights, 1948, Article 5 states that:

"5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

g 232. Article 7 of the International Covenant on Civil and Political Rights, 1966 also touches on the same aspect. It reads as follows:

"7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

h ⁶³ *Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cr) 155
93 (1997) 1 SCC 416 : 1997 SCC (Cr) 92 : AIR 1997 SC 610

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233. Special emphasis was placed on the definitions of "torture" as well as "cruel, inhuman or degrading treatment or punishment" in Articles 1 and 16 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. a

"Article 1

1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. b

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application. c

* * *

Article 16

1. Each State party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment. d

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion." e

234. We were also alerted to the U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988 which have been adopted by the United Nations General Assembly. Principles 1, 6 and 21 hold relevance for us: f

"Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person. g

* * *

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment. h

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- a The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

* * *

b *Principle 21*

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

- c 2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment."

It was shown that protections against torture and "cruel, inhuman or degrading treatment or punishment" are accorded to persons who are arrested or detained in the course of armed conflicts between nations.

- d 235. In the Geneva Convention Relative to the Treatment of Prisoners of War, 1949 the relevant extract reads:

Article 17

- e ... No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind. ...

- f 236. Having surveyed these materials, it is necessary to clarify that we are not absolutely bound by the contents of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (hereinafter "the Torture Convention"). This is so because even though India is a signatory to this Convention, it has not been ratified by Parliament in the manner provided under Article 253 of the Constitution and neither do we have a national legislation which has provisions analogous to those of the Torture Convention. However, these materials do hold significant persuasive value since they represent an evolving international consensus on the nature and specific contents of human rights norms.

- g 237. The definition of "torture" indicates that the threshold for the same is the intentional infliction of physical or mental pain and suffering, by or at the instance of a public official for the purpose of extracting information or confessions. "Cruel, inhuman or degrading treatment" has been defined as conduct that does not amount to torture but is wide enough to cover all kinds of abuses. Hence, proving the occurrence of "cruel, inhuman or degrading treatment" would require a lower threshold than that of torture. In addition to highlighting these definitions, the counsel for the appellants have submitted
- h that causing physical pain by injecting a drug can amount to "injury" as

defined by Section 44 IPC or "hurt" as defined in Section 319 of the same Code.

238. In response, the counsel for the respondents have drawn our attention to the literature which suggests that in the case of the impugned techniques, the intention on part of the investigators is to extract information and not to inflict any pain or suffering. Furthermore, it has been contended that the actual administration of either the narcoanalysis technique, polygraph examination or the BEAP test does not involve a condemnable degree of "physical pain or suffering". Even though some physical force may be used or threats may be given to compel a person to undergo the tests, it was argued that the administration of these tests ordinarily does not result in physical injuries. (*See* Linda M. Keller, "Is Truth Serum Torture?"⁹⁴.)

239. However, it is quite conceivable that the administration of any of these techniques could involve the infliction of "mental pain or suffering" and the contents of their results could expose the subject to physical abuse. When a person undergoes a narcoanalysis test, he/she is in a half-conscious state and subsequently does not remember the revelations made in a drug-induced state. In the case of polygraph examination and the BEAP test, the test subject remains fully conscious during the tests but does not immediately know the nature and implications of the results derived from the same. However, when he/she later learns about the contents of the revelations, they may prove to be incriminatory or be in the nature of testimony that can be used to prosecute other individuals. We have also highlighted the likelihood of a person making incriminatory statements when he/she is subsequently confronted with the test results. The realisation of such consequences can indeed cause "mental pain or suffering" for the person who was subjected to these tests. The test results could also support the theories or suspicions of the investigators in a particular case. These results could very well confirm suspicions about a person's involvement in a criminal act. For a person in custody, such confirmations could lead to specifically targeted behaviour such as physical abuse. In this regard, we have repeatedly expressed our concern with situations where the test results could trigger undesirable behaviour.

240. We must also contemplate situations where a threat given by the investigators to conduct any of the impugned tests could prompt a person to make incriminatory statements or to undergo some mental trauma. Especially in cases of individuals from weaker sections of society who are unaware of their fundamental rights and unable to afford legal advice, the mere apprehension of undergoing scientific tests that supposedly reveal the truth could push them to make confessional statements. Hence, the act of threatening to administer the impugned tests could also elicit testimony. It is also quite conceivable that an individual may give his/her consent to undergo the said tests on account of threats, false promises or deception by the investigators. For example, a person may be convinced to give his/her

- a consent after being promised that this would lead to an early release from custody or dropping of charges. However, after the administration of the tests the investigators may renege on such promises. In such a case the relevant inquiry is not confined to the apparent voluntariness of the act of undergoing the tests, but also includes an examination of the totality of circumstances.

- b 241. Such a possibility had been outlined by the National Human Rights Commission which had published "*Guidelines Relating to Administration of Polygraph Test (Lie Detector Test) on an Accused (2000)*". The relevant extract has been reproduced below:

- c "... The lie detector test is much too invasive to admit of the argument that the authority for lie detector tests comes from the general power to interrogate and answer questions or make statements. (Sections 160-167 CrPC) However, in India we must proceed on the assumption of constitutional invasiveness and evidentiary impermissiveness to take the view that such holding of tests is a prerogative of the individual, not an empowerment of the police. Inasmuch as this invasive test is not authorised by law, it must perforce be regarded as illegal and unconstitutional unless it is voluntarily undertaken under non-coercive circumstances. If the police action of conducting a lie detector test is not authorised by law and impermissible, the only basis on which it could be justified is, if it is volunteered. There is a distinction between: (a) volunteering, and (b) being asked to volunteer. This distinction is of some significance in the light of the statutory and constitutional protections available to any person. There is a vast difference between a person saying, 'I wish to take a lie detector test because I wish to clear my name', and when a person is told by the police, 'If you want to clear your name, take a lie detector test.' A still worse situation would be where the police say, 'Take a lie detector test, and we will let you go.' In the first example, the person voluntarily wants to take the test. It would still have to be examined whether such volunteering was under coercive circumstances or not. In the second and third examples, the police implicitly (in the second example) and explicitly (in the third example) link up the taking of the lie detector test to allowing the accused to go free."

- g 242. We can also contemplate a possibility that even when an individual freely consents to undergo the tests in question, the resulting testimony cannot be readily characterised as voluntary in nature. This is attributable to the differences between the manner in which the impugned tests are conducted and an ordinary interrogation. In an ordinary interrogation, the investigator asks questions one by one and the subject has the choice of remaining silent or answering each of these questions. This choice is repeatedly exercised after each question is asked and the subject decides the nature and content of each testimonial response. On account of the continuous exercise of such a choice, the subject's verbal responses can be described as voluntary in nature. However, in the context of the impugned techniques the test subject does not exercise such a choice in a continuous
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manner. After the initial consent is given, the subject has no conscious control over the subsequent responses given during the test. In case of the narcoanalysis technique, the subject speaks in a drug-induced state and is clearly not aware of his/her own responses at the time. In the context of polygraph examination and the BEAP tests, the subject cannot anticipate the contents of the "relevant questions" that will be asked or the "probes" that will be shown. Furthermore, the results are derived from the measurement of physiological responses and hence the subject cannot exercise an effective choice between remaining silent and imparting personal knowledge. In light of these facts, it was contended that a presumption cannot be made about the voluntariness of the test results even if the subject had given prior consent.

243. In this respect, we can re-emphasise Principles 6 and 21 of the U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988. The Explanation to Principle 6 provides that:

"The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time."

Furthermore, Principle 21(2) lays down that:

"21. (2) No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity of decision or his judgment."

244. It is undeniable that during a narcoanalysis interview, the test subject does lose "awareness of place and passing of time". It is also quite evident that all the three impugned techniques can be described as methods of interrogation which impair the test subject's "capacity of decision or judgment". Going by the language of these principles, we hold that the compulsory administration of the impugned techniques constitutes "cruel, inhuman or degrading treatment" in the context of Article 21. It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same. The popular perceptions of terms such as "torture" and "cruel, inhuman or degrading treatment" are associated with gory images of blood-letting and broken bones. However, we must recognise that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences. [A similar conclusion has been made in the following paper: Marcy Strauss, "Criminal Defence in the Age of Terrorism—Torture"⁹⁵.]

245. It would also be wrong to sustain a comparison between the forensic uses of these techniques and the practice of medicine. It has been suggested that patients undergo a certain degree of "physical or mental pain and suffering" on account of medical interventions such as surgeries and drug

- treatments. However, such interventions are acceptable since the objective is to ultimately cure or prevent a disease or disorder. So it is argued that if the infliction of some "pain and suffering" is permitted in the medical field, it should also be tolerated for the purpose of expediting investigations in criminal cases. This is the point where our constitutional values step in. A society governed by rules and liberal values makes a rational distinction between the various circumstances where individuals face pain and suffering. While the infliction of a certain degree of pain and suffering is mandated by law in the form of punishments for various offences, the same cannot be extended to all those who are questioned during the course of an investigation. Allowing the same would vest unlimited discretion and lead to the disproportionate exercise of police powers.

Incompatibility with the "right to fair trial"

246. The respondents' position is that the compulsory administration of the impugned techniques should be permitted at least for investigative purposes, and if the test results lead to the discovery of fresh evidence, then these fruits should be admissible. We have already explained in light of the conjunctive reading of Article 20(3) of the Constitution and Section 27 of the Evidence Act, that if the fact of compulsion is proved, the test results will not be admissible as evidence. However, for the sake of argument, if we were to agree with the respondents and allow investigators to compel individuals to undergo these tests, it would also affect some of the key components of the "right to fair trial".

247. The decision of this Court in *D.K. Basu v. State of W.B.*⁹³, had stressed upon the entitlement of a person in custody to consult a lawyer. Access to legal advice is an essential safeguard so that an individual can be adequately apprised of his constitutional and statutory rights. This is also a measure which checks custodial abuses. However, the involuntary administration of any of the impugned tests can lead to a situation where such legal advice becomes ineffective. For instance even if a person receives the best of legal advice before undergoing any of these tests, it cannot prevent the extraction of information which may prove to be inculpatory by itself or lead to the subsequent discovery of incriminating materials. Since the subject has no conscious control over the drug-induced revelations or substantive inferences, the objective of providing access to legal advice are frustrated.

248. Since the subject is not immediately aware of the contents of the drug-induced revelations or substantive inferences, it is also conceivable that the investigators may chose not to communicate them to the subject even after completing the tests. In fact statements may be recorded or charges framed without the knowledge of the test subject. At the stage of trial, the prosecution is obliged to supply copies of all incriminating materials to the defendant but reliance on the impugned tests could curtail the opportunity of presenting a meaningful and wholesome defence. If the contents of the revelations or inferences are communicated much later to the defendant, there may not be sufficient time to prepare an adequate defence.

93 (1997) 1 SCC 416 : 1997 SCC (Cri) 92

249. Earlier in this judgment, we had surveyed some foreign judicial precedents dealing with each of the tests in question. A common concern expressed with regard to each of these techniques was the questionable reliability of the results generated by them. In respect of the narcoanalysis technique, it was observed that there is no guarantee that the drug-induced revelations will be truthful. Furthermore, empirical studies have shown that during the hypnotic stage, individuals are prone to suggestibility and there is a good chance that false results could lead to a finding of guilt or innocence. As far as polygraph examination is concerned, though there are some studies showing improvements in the accuracy of results with advancement in technology, there is always scope for error on account of several factors. Objections can be raised about the qualifications of the examiner, the physical conditions under which the test was conducted, the manner in which questions were framed and the possible use of "countermeasures" by the test subject. A significant criticism of polygraphy is that sometimes the physiological responses triggered by feelings such as anxiety and fear could be misread as those triggered by deception. Similarly, with the P300 waves test there are inherent limitations such as the subject having had "prior exposure" to the "probes" which are used as stimuli. Furthermore, this technique has not been the focus of rigorous independent studies. The questionable scientific reliability of these techniques comes into conflict with the standard of proof "beyond reasonable doubt" which is an essential feature of criminal trials.

250. Another factor that merits attention is the role of the experts who administer these tests. While the consideration of expert opinion testimony has become a mainstay in our criminal justice system with the advancement of fields such as forensic toxicology, questions have been raised about the credibility of experts who are involved in administering the impugned techniques. It is a widely accepted principle for evaluating the validity of any scientific technique that it should have been subjected to rigorous independent studies and peer review. This is so because the persons who are involved in the invention and development of certain techniques are perceived to have an interest in their promotion. Hence, it is quite likely that such persons may give unduly favourable responses about the reliability of the techniques in question.

251. Even though India does not have a jury system, the use of the impugned techniques could impede the fact-finding role of a trial Judge. This is a special concern in our legal system, since the same Judge presides over the evidentiary phase of the trial as well as the guilt phase. The consideration of the test results or their fruits for the purpose of deciding on their admissibility could have a prejudicial effect on the Judge's mind even if the same are not eventually admitted as evidence.

252. Furthermore, we echo the concerns expressed by the Supreme Court of Canada in *R. v. Beland*¹¹, where it was observed that reliance on scientific techniques could cloud human judgment on account of an "aura of

¹¹ (1987) 36 CCC 3d 481; (1987) 2 SCR 398 (Can SC)

infallibility". While Judges are expected to be impartial and objective in their evaluation of evidence, one can never discount the possibility of undue public pressure in some cases, especially when the test results appear to be inculpatory. We have already expressed concerns with situations where media organisations have either circulated the video recordings of narcoanalysis interviews or broadcasted dramatised reconstructions, especially in sensational criminal cases.

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- b 253. Another important consideration is that of ensuring parity between the procedural safeguards that are available to the prosecution and the defence. If we were to permit the compulsory administration of any of the impugned techniques at the behest of investigators, there would be no principled basis to deny the same opportunity to the defendants as well as witnesses. If the investigators could justify reliance on these techniques, there would be an equally compelling reason to allow the indiscrete administration of these tests at the request of convicts who want reopening of their cases or even for the purpose of attacking and rehabilitating the credibility of the witnesses during a trial. The decision in *United States v. Scheffer*¹⁰, has highlighted the concerns with encouraging litigation, that is, collateral to the main facts in issue. We are of the view that an untrammelled right of resorting to the techniques in question will lead to an unnecessary rise in the volume of frivolous litigation before our courts.
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254. Lastly, we must consider the possibility that the victims of offences could be forcibly subjected to any of these techniques during the course of investigation. We have already highlighted a provision in the *Laboratory Procedure Manual* for polygraph tests which contemplates the same for ascertaining the testimony of victims of sexual offences. In light of the preceding discussion, it is our view that irrespective of the need to expedite investigations in such cases, no person who is a victim of an offence can be compelled to undergo any of the tests in question. Such a forcible administration would be an unjustified intrusion into mental privacy and could lead to further stigma for the victim.

f *Examining the "compelling public interest"*

- g 255. The respondents have contended that even if the compulsory administration of the impugned techniques amounts to a seemingly disproportionate intrusion into personal liberty, their investigative use is justifiable since there is a compelling public interest in eliciting information that could help in preventing criminal activities in the future. Such utilitarian considerations hold some significance in light of the need to combat terrorist activities, insurgencies and organised crime. It has been argued that such exigencies justify some intrusions into civil liberties. The textual basis for these restraints could be grounds such as preserving the "sovereignty and integrity of India", "the security of the State" and "public order" among others. It was suggested that if investigators are allowed to rely on these tests, the results could help in uncovering plots, apprehending suspects and
- h

preventing armed attacks as well as the commission of offences. Reference was also made to the frequently discussed "ticking bomb" scenario. This hypothetical situation examines the choices available to investigators when they have reason to believe that the person whom they are interrogating is aware of the location of a bomb. The dilemma is whether it is justifiable to use torture or other improper means for eliciting information which could help in saving the lives of ordinary citizens. [The arguments for the use of "truth serums" in such situations have been examined in the following articles: Jason R. Odeschoo, "Truth or Dare?: Terrorism and Truth Serum in the Post-9/11 World"⁹⁶; Kenneth Lasson, "Torture, Truth Serum, and Ticking Bombs: Toward a Pragmatic Perspective on Coercive Interrogation"⁹⁷.]

256. While these arguments merit consideration, it must be noted that ordinarily it is the task of the legislature to arrive at a pragmatic balance between the often competing interests of "personal liberty" and "public safety". In our capacity as a constitutional court, we can only seek to preserve the balance between these competing interests as reflected in the text of the Constitution and its subsequent interpretation. There is absolutely no ambiguity on the status of principles such as the "right against self-incrimination" and the various dimensions of "personal liberty". We have already pointed out that the rights guaranteed in Articles 20 and 21 of the Constitution of India have been given a non-derogable status and they are available to citizens as well as foreigners. It is not within the competence of the judiciary to create exceptions and limitations on the availability of these rights.

257. Even though the main task of constitutional adjudication is to safeguard the core organising principles of our polity, we must also highlight some practical concerns that strengthen the case against the involuntary administration of the tests in question. Firstly, the claim that the results obtained from these techniques will help in extraordinary situations is questionable. All of the tests in question are those which need to be patiently administered and the forensic psychologist or the examiner has to be very skillful and thorough while interpreting the results. In a narcoanalysis test the subject is likely to divulge a lot of irrelevant and incoherent information. The subject is as likely to divulge false information as he/she is likely to reveal useful facts. Sometimes the revelations may begin to make sense only when compared with the testimony of several other individuals or through the discovery of fresh materials. In a polygraph test, interpreting the results is a complex process that involves accounting for distortions such as "countermeasures" used by the subject and weather conditions among others. In a BFEAP test, there is always the possibility of the subject having had prior exposure to the "probes" that are used as stimuli. All of this is a gradually unfolding process and it is not appropriate to argue that the test results will always prove to be crucial in times of exigency. It is evident that both the

⁹⁶ 57 Stanford Law Review 209-255 (October 2004)

⁹⁷ 39 Loyola University Chicago Law Journal 329- 360 (Winter 2008)

tasks of preparing for these tests and interpreting their results need considerable time and expertise.

- a 258. Secondly, if we were to permit the forcible administration of these techniques, it could be the first step on a very slippery slope as far as the standards of police behaviour are concerned. In some of the impugned judgments, it has been suggested that the promotion of these techniques could reduce the regrettably high incidence of "third-degree methods" that are being used by policemen all over the country. This is a circular line of reasoning since one form of improper behaviour is sought to be replaced by another. What this will result in is that investigators will increasingly seek reliance on the impugned techniques rather than engaging in a thorough investigation. The widespread use of "third-degree" interrogation methods so as to speak is a separate problem and needs to be tackled through long-term solutions such as more emphasis on the protection of human rights during police training, providing adequate resources for investigators and stronger accountability measures when such abuses do take place.
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- d 259. Thirdly, the claim that the use of these techniques will only be sought in cases involving heinous offences rings hollow since there will no principled basis for restricting their use once the investigators are given the discretion to do so. From the statistics presented before us as well as the charges filed against the parties in the impugned judgments, it is obvious that investigators have sought reliance on the impugned tests to expedite investigations, unmindful of the nature of offences involved. In this regard, we do not have the authority to permit the qualified use of these techniques by way of enumerating the offences which warrant their use. By itself, permitting such qualified use would amount to a law-making function which is clearly outside the judicial domain.
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- f 260. One of the main functions of constitutionally prescribed rights is to safeguard the interests of citizens in their interactions with the Government. As the guardians of these rights, we will be failing in our duty if we permit any citizen to be forcibly subjected to the tests in question. One could argue that some of the parties who will benefit from this decision are hardened criminals who have no regard for societal values. However, it must be borne in mind that in constitutional adjudication our concerns are not confined to the facts at hand but extend to the implications of our decision for the whole population as well as the future generations.
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- h 261. Sometimes there are apprehensions about Judges imposing their personal sensibilities through broadly worded terms such as "substantive due process", but in this case our inquiry has been based on a faithful understanding of principles entrenched in our Constitution. In this context it would be useful to refer to some observations made by the Supreme Court of Israel in *Public Committee Against Torture in Israel v. State of Israel*⁹⁸, where it was held that the use of physical means (such as shaking the suspect, sleep deprivation and enforcing uncomfortable positions for prolonged

⁹⁸ (1999) 7 BHRC 31 : HC 5100/94 (1999) (SC of Israel)

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periods) during interrogation of terrorism suspects was illegal. Among other questions raised in that case, it was also held that the "necessity" defence could be used only as a post-factum justification for past conduct and that it could not be the basis of a blanket pre-emptive permission for coercive interrogation practices in the future. Ruling against such methods, Aharon Barak, J. held at p. 26:

"... This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the 'rule of law' and recognition of an individual's liberty constitutes an important component in its understanding of security."

Conclusion

262. In our considered opinion, the compulsory administration of the impugned techniques violates the "right against self-incrimination". This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible "conveyance of personal knowledge that is relevant to the facts in issue". The results obtained from each of the impugned tests bear a "testimonial" character and they cannot be categorised as material evidence.

263. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of "substantive due process" which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of "ejusdem generis" and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to "cruel, inhuman or degrading treatment" with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the "right

to fair trial". Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the "right against self-incrimination".

- a 264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act, 1872.
- b
- c 265. The National Human Rights Commission had published *Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused* in 2000. These Guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the "narcoanalysis technique" and the "Brain Electrical Activation Profile" test. The text of these Guidelines has been reproduced below:
 - d (i) No lie detector tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.
 - e (ii) If the accused volunteers for a lie detector test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.
 - (iii) The consent should be recorded before a Judicial Magistrate.
 - (iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.
 - f (v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a "confessional" statement to the Magistrate but will have the status of a statement made to the police.
 - (vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.
 - g (vii) The actual recording of the lie detector test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.
 - (viii) A full medical and factual narration of the manner of the information received must be taken on record.
- h 266. The present batch of appeals is disposed of accordingly.

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(2011) 7 Supreme Court Cases 547

(BEFORE B. SUDERSHAN REDDY AND S.S. NIJAR, JJ.)

a NANDINI SUNDAR AND OTHERS .. Petitioners;

Versus

STATE OF CHHATTISGARH .. Respondent.

Writ Petition (C) No. 250 of 2007[†] with WPs (Crl.) Nos. 119 of 2007
and 103 of 2009, decided on July 5, 2011

b A. Police — Chhattisgarh Police Act, 2007 (13 of 2007) — Ss. 9 and 23
— Appointment of tribal youths as Special Police Officers (SPOs) for
counter-insurgency activities against Maoists/Naxalites — Constitutionality

c — No minimum educational qualification — 42 hours' training to those
who had passed fifth class, and one month extra training for those who had
not — Employment temporary in nature for one year albeit extendable from
year to year — Firearms provided to SPOs (tribal youths) them but their
duties placing their lives in equal or more danger than that faced by regular
police officers — However, remuneration limited to honorarium of Rs 3000
per month — Such appointment, held, treated unequals as equals and
denigrated such SPOs' dignity as human beings — Hence, violative of Art.
d 14 as well as Art. 21 — Such risky employment could not be conceived
under rubric of "livelihood" within Art. 21 — Considering various aspects
of such employment, held, such SPOs could be targets of Maoists/Naxalites
and, after expiry of the short term of employment could themselves be a risk
to the State, to security forces or even to society and people in the area
concerned — Such risks, held, violative of Art. 21 — Use of such SPOs in
Chhattisgarh could not in the absence of its legality and constitutionality be
e justified merely on the ground of effectiveness — Detailed directions laying
down corrective measures, issued — Constitution of India — Arts. 14, 21
and 162 — Human and Civil Rights — Maoist/Naxalite uprising

f B. Police — Chhattisgarh Police Act, 2007 (13 of 2007) — Ss. 9 and 23
— Appointment of tribals as SPOs for counter-insurgency activities against
Maoists/Naxalites — If, on facts, was with their will and volition — Test to
determine — Degree of free will and volition, held, has to be estimated with
due respect to, and in context of, the complex concepts the persons
concerned are expected to grasp, including adequacy or otherwise of their
training for the task they are to perform — So considered, held, informed
consent not inferable in present case — Contract Act, 1872 — S. 14 —
Jurisprudence — Paternalism of State — Parens patriae role — Instance of

g C. Constitution of India — Arts. 162, 73, 14 and 21 — Policy decision of
State — Validity — Effectiveness of such policy, held, not sole determinant
— It should be legal and supported by constitutional framework —
Administrative Law — Administrative Action — Administrative or
executive function — Policy — Policy decision — Validity

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[†] Under Article 32 of the Constitution of India

D. Constitution of India — Arts. 32, 162, 73, 14, 21 and Sch. VII List II Entry 1 — Exercise of power under Art. 32 — Essence and scope of — While striking down State policies designed to combat terrorism and extremism, held, judiciary does not seek to interfere with security considerations which are within the purview of executive and legislature — Judiciary intervenes in such matters only to safeguard constitutional values and goals, and fundamental rights such as equality and right to life — Further held, every organ of State must function within four corners of constitutional responsibility — That is the ultimate rule of law — Judicial review — Scope — Constitutional Law — Grand and Separation of powers — Rule of law

E. Police — Chhattisgarh Police Act, 2007 (13 of 2007) — Ss. 2(h), (k) & (o), 9(1) & (2), 23(1)(a) to (l), 24, 25, 50 and 53 — Constitutionality of Ss. 9 and 23 — Obligations of Central Government where its financial assistance enabled State Government to appoint Special Police Officers (SPOs)

— Provision in S. 9 empowering SP to appoint SPOs, without specifying any limits as to number of SPOs to be appointed, their qualifications, their training or duties, held, violative of Art. 14 unless read down — S. 9 of 2007 Act contrasted with S. 17, Police Act, 1861 — Similarly, functions and responsibilities of police officers enumerated in S. 23 of 2007 Act, except S. 23(1)(h) and S. 23(1)(i), to the extent they are construed as responsibilities that may be undertaken by SPOs, held, have also to be read down

— Notwithstanding that policing and law and order are State subjects, where financial assistance given by Central Government enabled State Government to appoint SPOs, held, Central Government too was under obligation to issue directions as to manner of recruitment of SPOs, their training and purposes for which they could be deployed — Further held, even the Special Police Officers (Appointment, Training and Conditions of Service) Regulatory Procedures, 2011 framed by Chhattisgarh State were not likely to improve the situation — Provisions of said Procedures considered in detail — Police Act, 1861 — Ss. 17, 18 and 19 — Constitution of India — Arts. 14, 355 and Sch. VII List II Entries 1 and 2 — Interpretation of Statutes — Subsidiary Rules — Reading down a statute

F. Police — Chhattisgarh Police Act, 2007 (13 of 2007) — Ss. 9(1) & (2) and 23(1)(a) to (l) — Appointment of SPOs to perform duties of regular police officers except those specified in Ss. 23(1)(h) and 23(1)(i), held, unconstitutional — Constitution of India, Arts. 14 and 21

The petitioners in the present writ petition filed under Article 32 of the Constitution alleged, inter alia, widespread violation of human rights of people of Dantewada District, and its neighbouring areas in Chhattisgarh State, on account of the ongoing armed Maoist/Naxalite insurgency, and the counter-insurgency activities launched by the State Government. That the State of Chhattisgarh was actively promoting the activities of an armed civilian vigilante group, "Salwa Judum", which had led to further widespread violation of human rights. However, the respondent State claimed that it had powers to arm the young men of the tribal tracts, who were appointed as temporary police officers (SPOs) to fight the alleged Maoist extremists. It added that Salwa Judum had

- a almost ceased to exist, and that the Special Police Officers (SPOs) were not Salwa Judum. It insisted that the only option for the State was to rule with an iron fist, establish a social order in which every person speaking for human rights of citizens was to be deemed as suspect, and a Maoist. In that view, persons like the petitioners and one S, a civil society leader (petitioner in a connected writ petition) were all to be treated as Maoists, or supporters of Maoists. By an interim order, the Supreme Court directed the National Human Rights Commission (NHRC) to verify the petitioners' allegations and file a report. NIIRC filed its report. The Supreme Court then directed the Chhattisgarh Government to consider the same and to comply with certain directions given by the Supreme Court.

- b The issues raised during the present hearing related to: (i) the nature of employment of SPOs, also popularly known as Koya Commandos, the manner of their training, their status as police officers, the fact that they were provided with firearms, and the various allegations of the excessive violence perpetrated by such SPOs; and (ii) allegations made by S, of certain events of lawlessness and violence.

c Directing the case to be listed again in the first week of September, 2011 for further directions, the Supreme Court

Held :

- d Article 14 is violated by the policy of appointment of SPOs in the present case because subjecting such youngsters to the same levels of dangers as members of the regular force who have better educational backgrounds, receive better training, and because of better educational backgrounds possess a better capacity to benefit from training that is appropriate for the duties to be performed in counter-insurgency activities, would be to treat unequals as equals. Moreover, inasmuch as such youngsters, with such low educational qualifications and the consequent scholastic inabilities to benefit from appropriate training, can also not be expected to be effective in engaging in counter-insurgency activities, the policy of employing such youngsters as SPOs engaged in counter-insurgency activities is irrational, arbitrary and capricious. (Paras 73, 74, 79 and 89)

- e Article 21 is violated because, notwithstanding the claimed volition on the part of these youngsters to appointment as SPOs engaged in counter-insurgency activities, youngsters with such low educational qualifications cannot be expected to understand the dangers that they are likely to face, the skills needed to face such dangers, and the requirements of the necessary judgment while discharging such responsibilities. Further, because of their low levels of educational achievements, they will also not be in a position to benefit from an appropriately designed training program, that is commensurate with the kinds of duties, liabilities, disciplinary code and dangers that they face, to their lives and health. Consequently, appointing such youngsters as SPOs with duties, that would involve any counter-insurgency activities against the Maoists, even if it were claimed that they have been put through rigorous training, would be to endanger their lives. (Paras 73, 75 and 89)

- g Certainly, within the ambit of all those "limits and faculties by which life is enjoyed" also lies respect for dignity of a human being, irrespective of whether he or she is poor, illiterate, less educated, and less capable of exercising proper choice. The State has been found to have the positive obligation pursuant to Article 21 to necessarily undertake those steps that would enhance human dignity, and enable the individual to lead a life of at least some dignity. The

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Preamble of the Constitution affirms as the goal of the nation, the promotion of human dignity. The actions of the State, in appointing barely literate youngsters, as SPOs engaged in counter-insurgency activities, of any kind, against the Maoists, who are incapable, on account of low educational achievements, of learning all the skills, knowledge and analytical tools to perform such a role, and thereby endangering their lives, is necessarily a denigration of their dignity as human beings. (Para 77)

Olga Tellis v. Bombay Municipal Corpn., (1985) 3 SCC 545, *relied on*
Munn v. Illinois, 24 L Ed 77; 94 US 113 (1875), *cited*

To employ such ill-equipped youngsters as SPOs engaged in counter-insurgency activities, including the tasks of identifying Maoists and non-Maoists, and equipping them with firearms, would endanger the lives of others in the society. That would be a violation of Article 21 rights of a vast number of people in the society. That they are paid only an "honorarium", and appointed only for temporary periods, are further violations of Article 14 and Article 21.

(Paras 78, 36, 37 and 47 to 72)

To pay only an honorarium to those youngsters, even though they place themselves in equal danger, and in fact even more, than regular police officers, is to denigrate the value of their lives. It can only be justified by a cynical, and indeed an inhuman attitude, that places little or no value on the lives of such youngsters. Further, given the poverty of those youngsters, and the feelings of rage, and desire for revenge that many suffer from, on account of their previous victimisation in a brutal social order, to engage them in activities that endanger their lives, and exploit their dehumanised sensibilities, is to violate the dignity of human life, and humanity. (Para 79)

The State of Chhattisgarh and the Union of India, claim that employing such youngsters as SPOs engaged in counter-insurgency activities is vital, and necessary to provide security to the people affected by Maoist violence, and to fight the threat of Maoist extremism. The State necessarily has the obligation, moral and constitutional, to combat such extremism, and provide security to the people of the country. When the judiciary strikes down State policies, designed to combat terrorism and extremism, it does not seek to interfere in security considerations, for which the expertise and responsibility lie with the executive, directed and controlled by the legislature. The judiciary intervenes in such matters in order to safeguard constitutional values and goals, and fundamental rights such as equality, and right to life. Indeed, such expertise and responsibilities vest in the judiciary. (Paras 81 and 82)

The primordial constitutional value is that it is the responsibility of every organ of the State to function within the four corners of constitutional responsibility. That is the ultimate rule of law. (Para 84)

GVK Industries v. ITO, (2011) 4 SCC 36, *followed*

Both the Union of India and the State of Chhattisgarh, have sought to rationalise the use of SPOs in Chhattisgarh, on the ground that they are effective in combating Maoist/Naxalite activities and violence. The fight against terrorism and/or extremism cannot be effectuated by constitutional democracies by whatever means that are deemed to be efficient. Efficiency is not the sole arbiter of all values, and goals that constitutional democracies seek to be guided by, and achieve. Consequently, all efficient means, if indeed they are efficient, are not legal means, supported by constitutional frameworks. (Paras 85, 89 and 86)

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Almadani v. Ministry of Defense, HC 3451/02, 56(3) PD [also cited in Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2003)], *relied on*

- a The primordial problem lies deep within the socio-economic policies pursued by the State in a society that was already endemically, and horrifically, suffering from gross inequalities. Consequently, the fight against Maoists/Naxalites is no less a fight for moral, constitutional and legal authority over the minds and hearts of our people. The Constitution of India provides the gridlines within which the State is to act, both to assert such authority, and also to initiate, nurture and sustain such authority. To transgress those gridlines is to act unlawfully, imperilling the moral and legal authority of the State and the Constitution. The Supreme Court, is not unaware of the gravity that extremist activities pose to the citizens, and to the State. However, the Constitution, encoding cons of human wisdom, also warns us that ends do not justify all means, and that an essential and integral part of the ends to which the collective power of the people may be used to achieve has to necessarily keep the means of exercise of State power within check and constitutional bounds. To act otherwise is to act unlawfully. Laws cannot remain silent when the cannons roar. (Para 86)
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The problem cannot be the people of Chhattisgarh, whose human rights are widely acknowledged to being systemically, and on a vast scale, being violated by the Maoists/Naxalites on one side, and the State, and some of its agents, on the other. Nor is the problem with those well-meaning, thoughtful and reasonable people who question those conditions. The problem rests in the amoral political economy that the State endorses, and the resultant revolutionary politics that it necessarily spawns. (Paras 11 to 26)

Joseph E. Stiglitz: "Making Natural Resources into a Blessing Rather Than a Curse" in [Svetlana Tsalik and Arya Schiffrin (Eds.)], "Covering Oil" (*Open Society Institute*, 2005), *referred to*

Philip Bobbitt: *Terror and Consent—The Wars for the Twenty-first Century* [Penguin Books (Allen Lane, 2008)], *referred to*

- e The response of law, to unlawful activities such as those indulged in by extremists, especially where they find their genesis in social disaffection on account of socio-economic and political conditions has to be rational within the borders of constitutional permissibility. This necessarily implies a twofold path: (i) undertaking all those necessary socially, economically and politically remedial policies that lessen social disaffection giving rise to such extremist violence; and (ii) developing a well-trained, and professional law enforcement capacities and forces that function within the limits of constitutional action. The creation of a cadre like groups of SPOs, temporarily employed and paid an honorarium, out of uneducated or undereducated tribal youths, many of whom are also informed by feelings of rage, hatred and a desire for revenge, to combat Maoist/Naxalite activities runs counter to both those prescriptions. The instant matters, in the case of SPOs in Chhattisgarh, represent an extreme form of transgression of constitutional boundaries. (Paras 87 and 88)
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- Therefore, it is directed that: (i) the State of Chhattisgarh should immediately cease and desist from using SPOs in any manner or form in any activities, directly or indirectly, aimed at controlling, countering, mitigating or otherwise eliminating Maoist/Naxalite activities in the State of Chhattisgarh; (ii) the Union of India should cease and desist, forthwith, from using any of its funds in supporting, directly or indirectly the recruitment of SPOs for the said purposes; (iii) the State of Chhattisgarh shall forthwith make every effort to
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recall all firearms issued to any of SPOs along with any and all accoutrements and accessories issued to use such firearms; (iv) the State of Chhattisgarh shall forthwith make arrangements to provide appropriate security, and undertake such measures as are necessary, and within bounds of constitutional permissibility, to protect the lives of those who had been employed as SPOs previously, or who had been given any initial orders of selection or appointment, from any and all forces; and (v) the State of Chhattisgarh shall take all appropriate measures to prevent the operation of any group, including but not limited to Salwa Judum and Koya Commandos, that in any manner or form seek to take law into private hands, act unconstitutionally or otherwise violate the human rights of any person. Such measures shall include, but not be limited to, investigation of all previously inappropriately or incompletely investigated instances of alleged criminal activities of Salwa Judum, or Koya Commandos, filing of appropriate FIRs and diligent prosecution. (Para 90)

Moreover, it is held that appointment of SPOs to perform any of the duties of regular police officers, other than those specified in Section 23(1)(h) and Section 23(1)(i) of the Chhattisgarh Police Act, 2007, is unconstitutional. Tribal youths, who had been previously engaged as SPOs in counter-insurgency activities, in whatever form, against Maoists/Naxalites may be employed as SPOs to perform duties limited to those enumerated in Sections 23(1)(h) and 23(1)(i) of the CPA, 2007, provided that they had not engaged in any activities, that may be deemed to be violations of human rights of other individuals or violations of any disciplinary code or criminal laws that they were lawfully subject to. (Para 91)

G. Constitution of India — Art. 32 — Investigation directed to be taken over by CBI — Maoist/Naxalite activities in Chhattisgarh State — During currency thereof, civil society leader alleging violence in certain villages as well as violence by various people including Special Police Officers (SPOs), Koya Commandos and Salwa Judum against said civil society leader himself and persons travelling with him to provide humanitarian aid to victims of violence in said villages — In such circumstances, State Government's offer to constitute Inquiry Commission, held, not sufficient — Therefore, CBI directed to take over investigation immediately and take appropriate legal action against all individuals responsible for said events — Police — Chhattisgarh Police Act, 2007 (13 of 2007) — S. 9 — Public Accountability and Vigilance — Commissions of Inquiry Act, 1952 — Ss. 3 and 4 — Delhi Special Police Establishment Act, 1946 (25 of 1946), Ss. 4 to 6

(Paras 92 to 96)

Sanjiv Kumar v. State of Haryana, (2005) 5 SCC 517, *relied on*

H. Constitution of India — Sch. VII List II Entry 1 and Arts. 162, 73, 14, 21, 39(b) & Preamble — Maoist/Naxalite activities in Chhattisgarh State and counter-insurgency measures thereagainst violating human rights — Constitutionality of such counter-insurgency measures — Various aspects of the problem, relevant to determination of — Gap between principled exercise of power as postulated in Constitution and reality of situation in Chhattisgarh, noticed — Root-cause of armed revolt, sufferings of people on account of both Maoist insurgency activities and counter-insurgency unleashed by State, and shortcomings of State in pursuing development

- paradigm enabling certain sections of society to grab resources of the poor and violate their dignity, discussed in detail — For such finding against State, while relying on report of expert body constituted by Planning Commission of India, judicial notice taken of practice of government reports understating actuality of circumstances — Policy of State in giving financial facilities to the rich, while instead of taking welfare measures for the poor, arming poor tribal youths in the name of counter-insurgency measures, criticised — State reminded of its duty to provide security to all its citizens without violating human dignity — Evidence Act, 1872 — Ss. 114 Ill. (e) and 56 — Government reports — Practice of, understating actuality of circumstances — Judicial notice taken of — Human and Civil Rights — Maoist/Naxalite uprising — Internal Extremism/Anarchy/Uprising

(Paras 2 to 27)

- Joseph Conrad: *Heart of Darkness and Selected Short Fiction* (Barnes and Noble Classics, 2003); Joseph Conrad: "Geography and Some Explorers", *National Geographic Magazine*, Vol. 45, 1924; Ajay K. Mehra: "Maoism in a globalising India" in Jorge Heine & Ramesh Thakur (Eds.), *The Dark Side of Globalisation* (United Nations University Press, 2011); *Development Challenges in Extremist Affected Areas*, Report of an expert group to Planning Commission, Government of India (New Delhi, April 2008); Joseph E. Stiglitz: "Making Natural Resources into a Blessing Rather Than a Curse" in Svetlana Tsalik and Arya Schiffrin (Eds.), "Covering Oil" (Open Society Institute, 2005); "The Failure and Collapse of Nation-States—BREAKDOWN, PREVENTION AND FAILURE" in Robert I. Rotberg (Ed.), "WHEN STATES FAIL: CAUSES AND CONSEQUENCES" (Princeton University Press, 2004); Aharon Barak: *The Judge in a Democracy* (Princeton University Press, 2006), referred to

- I. Constitutional Law — Grant and Separation of powers — Generally — Democracy — Democratic republic — Obligation corresponding to benefits of, held, is to bear discipline and rigour of constitutionalism, essence of which is accountability of power — Hence, power of each organ of State and its agents can be used only for promotion of constitutional values and vision — Constitution of India — Preamble, Ss. 12, 53, 79, 124, 154, 168, 214, 233, 245 and 246 — Power vested in each organ of State and its agents — Purpose for which it can be used

(Para 1)

H-D/48268/C

- f Advocates who appeared in this case :

- Gopal Subramaniam, Solicitor General, H.P. Raval, Additional Solicitor General, Ashok Desai, Colin Gonsalves, T.S. Doabia, Harish N. Salve, M.N. Krishnamani and Rajinder Sachar, Senior Advocates (Ms Nitya Ramakrishnan, Ms Menaka Guruswamy, Ms Suhasini Sen, Bipin Aspatwar, Rahul Kripalani, Ms Sumita Hazarika, Divya Jyoti Jaipuria, Ms Jyoti Meendiratta, Ms Sunita Sharma, Ms Sushma Suri, Ms Anilba Shenoy, Dr. Manish Singhvi, Atul Jha, Dharmendra Kr. Sinha, Amit Kumar, A. Dasaratha, Naveen R. Nath, Subhash Kaushik, T.A. Khan, P.K. Dey, Arvind Kr. Sharma, Ms Padmalaxmi and Shreekanth N. Terdal, Advocates) for the appearing parties.

Chronological list of cases cited

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| | 2. (2005) 5 SCC 517, <i>Sanjiv Kumar v. State of Haryana</i> | 588e |
| | 3. HC 3451/02, 56(3) PD, <i>Abmadani v. Ministry of Defense</i> | 585b |
| h | 4. (1985) 3 SCC 545, <i>Olga Tellis v. Bombay Municipal Corpn.</i> | 582g |
| | 5. 24 L Ed 77 : 94 US 113 (1875), <i>Munn v. Illinois</i> | 582g |

ORDER

PART I

1. We, the people as a nation, constituted ourselves as a sovereign democratic republic to conduct our affairs within the four corners of the Constitution, its goals and values. We expect the benefits of democratic participation to flow to us—all of us—so that we can take our rightful place, in the League of Nations, befitting our heritage and collective genius. Consequently, we must also bear the discipline, and the rigour of constitutionalism, the essence of which is accountability of power, whereby the power of the people vested in any organ of the State, and its agents, can only be used for promotion of constitutional values and vision. a

2. This case represents a yawning gap between the promise of principled exercise of power in a constitutional democracy, and the reality of the situation in Chhattisgarh, where the respondent, the State of Chhattisgarh, claims that it has a constitutional sanction to perpetrate, indefinitely, a regime of gross violation of human rights in a manner, and by adopting the same modes, as done by Maoist/Naxalite extremists. The State of Chhattisgarh also claims that it has the powers to arm, with guns, thousands of mostly illiterate or barely literate young men of the tribal tracts, who are appointed as temporary police officers, with little or no training, and even lesser clarity about the chain of command to control the activities of such a force, to fight the battles against alleged Maoist extremists. b
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3. As we heard the instant matters before us, we could not but help be reminded of the novella, *Heart of Darkness* by Joseph Conrad, who perceived darkness at three levels: (i) the darkness of the forest, representing a struggle for life and the sublime; (ii) the darkness of colonial expansion for resources; and finally (iii) the darkness, represented by inhumanity and evil, to which individual human beings are capable of descending, when supreme and unaccounted force is vested, rationalised by a warped world view that parades itself as pragmatic and inevitable, in each individual level of command. Set against the backdrop of resource-rich darkness of the African tropical forests, the brutal ivory trade sought to be expanded by the imperialist-capitalist expansionary policy of European powers, Joseph Conrad describes the grisly, and the macabre states of mind and justifications advanced by men, who secure and wield force without reason, sans humanity, and any sense of balance. The main perpetrator in the novella, Kurtz, breathes his last with the words: "The horror! The horror!"¹ Conrad characterised the actual circumstances in Congo between 1890 and 1910, based on his personal experiences there, as "the vilest scramble for loot that ever disfigured the history of human conscience"². e
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4. As we heard more and more about the situation in Chhattisgarh, and the justifications being sought to be pressed upon us by the respondents, it began to become clear to us that the respondents were envisioning modes of h

¹ Joseph Conrad, *Heart of Darkness and Selected Short Fiction* (Barnes and Noble Classics, 2003).

² Joseph Conrad, "Geography and Some Explorers", *National Geographic Magazine*, Vol. 45, 1924.

- State action that would seriously undermine constitutional values. This may cause grievous harm to national interests, particularly its goals of assuring human dignity, with fraternity amongst groups, and the nation's unity and integrity. Given humanity's collective experience with unchecked power, which becomes its own principle, and its practice, its own *raison d'être*, resulting in the eventual dehumanisation of all the people, the scouring of the earth by the unquenchable thirst for natural resources by imperialist powers, and the horrors of two World Wars, modern constitutionalism posits that no wielder of power should be allowed to claim the right to perpetrate State's violence against anyone, much less its own citizens, unchecked by law, and notions of innate human dignity of every individual. Through the course of these proceedings, as a hazy picture of events and circumstances in some districts of Chhattisgarh emerged, we could not but arrive at the conclusion that the respondents were seeking to put us on a course of constitutional actions whereby we would also have to exclaim, at the end of it all: "The horror, The horror!"

5. People do not take up arms, in an organised fashion, against the might of the State, or against fellow human beings without rhyme or reason. Guided by an instinct for survival, and according to Thomas Hobbes, a fear of lawlessness that is encoded in our collective conscience, we seek an order. However, when that order comes with the price of dehumanisation, of manifest injustices of all forms perpetrated against the weak, the poor and the deprived, people revolt.

6. That large tracts of the State of Chhattisgarh have been affected by Maoist activities is widely known. It has also been widely reported that the people living in those regions of Chhattisgarh have suffered grievously, on account of both the Maoist insurgency activities, and the counter-insurgency unleashed by the State. The situation in Chhattisgarh is undoubtedly deeply distressing to any reasonable person. What was doubly dismaying to us was the repeated insistence, by the respondents, that the only option for the State was to rule with an iron fist, establish a social order in which every person is to be treated as suspect, and anyone speaking for human rights of citizens to be deemed as suspect, and a Maoist. In this bleak and miasmic world view propounded by the respondents in the instant case, historian Ramachandra Guha, noted academic Nandini Sundar, civil society leader Swami Agnivesh, and a former and well-reputed bureaucrat, E.A.S. Sarma, were all to be treated as Maoists, or supporters of Maoists. We must state that we were aghast at the blindness to constitutional limitations of the State of Chhattisgarh, and some of its advocates, in claiming that anyone who questions the conditions of inhumanity that are rampant in many parts of that State ought to necessarily be treated as Maoists, or their sympathisers, and yet in the same breath also claim that it needs the constitutional sanction, under our Constitution, to perpetrate its policies of ruthless violence against the people of Chhattisgarh to establish a constitutional order.

7. The problem, it is apparent to us, and would be so to most reasonable people, cannot be the people of Chhattisgarh, whose human rights are widely

acknowledged to being systemically, and on a vast scale, being violated by the Maoists/Naxalites on one side, and the State, and some of its agents, on the other. Nor is the problem with those well-meaning, thoughtful and reasonable people who question those conditions. The problem rests in the amoral political economy that the State endorses, and the resultant revolutionary politics that it necessarily spawns. In a recent book titled *The Dark Side of Globalisation* it has been observed that:

"[T]he persistence of 'Naxalism', the Maoist revolutionary politics, in India after over six decades of parliamentary politics is a visible paradox in a democratic 'socialist' India.... India has come into the twenty-first century with a decade of departure from the Nehruvian socialism to a free market, rapidly globalising economy, which has created new dynamics (and pockets) of deprivation along with economic growth. Thus the same set of issues, particularly those related to land, continue to fuel protest politics, violent agitator politics, as well as armed rebellion.... Are Governments and political parties in India able to grasp the socio-economic dynamics encouraging these politics or are they stuck with a security-oriented approach that further fuels them?"³

8. That violent agitator politics, and armed rebellion in many pockets of India have intimate linkages to socio-economic circumstances, endemic inequalities, and a corrupt social and State order that preys on such inequalities has been well recognised. In fact the Union of India has been repeatedly warned of the linkages. In a recent report titled "Development Challenges in Extremist Affected Areas"⁴, an expert group constituted by the Planning Commission of India makes the following concluding observations: (Paras 1.18.1 and 1.18.2)

"1.18.1. The development paradigm pursued since Independence has aggravated the prevailing discontent among marginalised sections of society. ... *the development paradigm as conceived by the policy-makers has always been imposed on these communities ... causing irreparable damage to these sections. The benefits of this paradigm ... have been disproportionately cornered by the dominant sections at the expense of the poor; who have borne most of the costs. Development which is insensitive to the needs of these communities has invariably caused displacement and reduced them to a sub-human existence.* In the case of tribes in particular it has ended up in destroying their social organisation, cultural identity, and resource base ... which cumulatively makes them increasingly vulnerable to exploitation.

1.18.2. ... *The pattern of development and its implementation has increased corrupt practices of a rent seeking bureaucracy and rapacious exploitation by the contractors, middlemen, traders and the greedy*

3 Ajay K. Mehra, "Maoism in a globalising India" in Jorge Heine & Ramesh Thakur (Eds.), *The Dark Side of Globalisation* (United Nations University Press, 2011).

4 Report of an expert group to Planning Commission, Government of India (New Delhi, April 2008).

sections of the larger society intent on grabbing their resources and violating their dignity." (emphasis supplied)

- a 9. It is also a well-known fact that government reports understate, in staid prose, the actuality of circumstances. That an expert body constituted by the Planning Commission of India, Government of India, uses the word "rapacious", connoting predation for satisfaction of inordinate greed, and subsistence by capture of living prey, is revelatory of the degree of human suffering that is being visited on vast sections of our fellow citizens. It can only be concluded that the expert body, in characterising the state of existence of large numbers of our fellow citizens, in large tracts of India, as "sub-human", is clearly indicating that such an existence is not merely on account of pre-existing conditions of significant material deprivation, but also that significant facets that are essential to human dignity have been systematically denied by the forces and mechanisms of the developmental paradigm unleashed by the State.

c 10. Equally poignantly, and indeed tragically, because the State in India seems to repeatedly insist on paying scant attention to such advice, the expert group further continues and advises: (Paras 1.18.3 and 1.18.4)

- d "1.18.3. This concludes our brief review of various disturbing aspects of the socio-economic context that prevails in large parts of India today, and that may (and can) contribute to politics such as that of the Naxalite movement or erupt as other forms of violence. It should be recognised that there are different kinds of movements, and that *calling and treating them generally as unrest, a disruption of law and order, is little more than a rationale for suppressing them by force.* It is necessary to contextualise the tensions in terms of social, economic and political background and bring back on the agenda the issues of the people—the right to livelihood, the right to life and a dignified and honourable existence. *The State itself should feel committed to the democratic and human rights and humane objectives that are inscribed in the Preamble, the fundamental rights and directive principles of the Constitution. The State has to adhere strictly to the rule of law. Indeed, the State has no other authority to rule.*

- f 1.18.4. It is critical for the Government to recognise that dissent or expression of dissatisfaction is a positive feature of democracy, that unrest is often the only thing that actually puts pressure on the Government to make things work and for the Government to live up to its own promises. However, the right to protest, even peacefully, is often not recognised by the authorities and even non-violent agitations are met with severe repression. ... *What is surprising is not the fact of unrest, but the failure of the State to draw right conclusions from it.* While the official policy documents recognise that there is a direct correlation between what is termed as extremism and poverty ... or point to the deep relationship between tribals and forests, or that the tribals suffer unduly from displacement, the Governments have in practice treated unrest merely as a law and order problem. It is necessary to change this mindset and bring about congruence between policy and implementation. *There*
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will be peace, harmony and social progress only if there is equity, justice and dignity for everyone." (emphasis supplied)

11. Rather than heeding such advice, which echoes the wisdom of our Constitution, what we have witnessed in the instant proceedings have been repeated assertions of inevitability of muscular and violent statecraft. Such an approach, informing the decisions of the Government of Chhattisgarh with respect to the situations in Dantewada, and its neighbouring districts, seemingly also blinds them to the fact that lawless violence, in response to violence by the Maoist/Naxalite insurgency, has not, and will not, solve the problems, and that instead it will only perpetuate the cycles of more violent, both intensive and extensive, insurgency and counter-insurgency. The death toll revealed by the Government of Chhattisgarh is itself indicative of this. The fact that the cycles of violence and counter-violence have now lasted nearly a decade ought to lead a reasonable person to conclude that the prognosis given by the expert committee of the Planning Commission to be correct.

12. The root cause of the problem, and hence its solution, lies elsewhere. The culture of unrestrained selfishness and greed spawned by modern neo-liberal economic ideology, and the false promises of ever-increasing spirals of consumption leading to economic growth that will lift everyone, undergird this socially, politically and economically unsustainable set of circumstances in vast tracts of India in general, and Chhattisgarh in particular. It has been reported that:

"Among the rapidly growing urban middle class, the corporate world is in a hurry to expand its manufacturing capacity. That means more land for manufacturing and trading. The peasants and tribals are the natural victims of acquisitions and displacements. The expanded mining activities encroach upon the forest domain.... Infrastructure development needs more steel, cement and energy.... Lacking public sector capacities, the income-poor but resource-rich States of eastern India are awarding mining and land rights to Indian and multinational companies.... Most of these deposits lie in territory inhabited by poor tribals and that is where Naxals operate. Chhattisgarh, a State of eastern India, has 23% of India's iron ore deposits and abundant coal. It has signed memoranda of understanding and other agreements worth billions with Tata Steel and ArcelorMittal, De Beers Consolidated Mines, BHP Billiton and Rio Tinto. Other States inviting big business and FDI have made similar deals.... The appearance of mining crews, construction workers and truckers in the forest has seriously alarmed the tribals who have lived in these regions from time immemorial."³

13. The justification often advanced, by advocates of the neo-liberal development paradigm, as historically followed, or newly emerging, in a more rapacious form, in India, is that unless development occurs, via rapid

³ Ajay K. Mehra, "Maoism in a globalising India" in Jorge Heine & Ramesh Thakur (Eds.), *The Dark Side of Globalisation* (United Nations University Press, 2011).

- a and vast exploitation of natural resources, the country would not be able to either compete on the global scale, nor accumulate the wealth necessary to tackle endemic and seemingly intractable problems of poverty, illiteracy, hunger and squalor. Whether such exploitation is occurring in a manner that is sustainable, by the environment and the existing social structures, is an oft-debated topic, and yet hurriedly buried. Neither the policy-makers nor the elite in India, who turn a blind eye to the gross and inhuman suffering of the displaced and the dispossessed, provide any credible answers. Worse still,
- b they ignore historical evidence which indicates that a development paradigm depending largely on the plunder and loot of the natural resources more often than not leads to failure of the State; and that on its way to such a fate, countless millions would have been condemned to lives of great misery and hopelessness.

- c 14. The more responsible thinkers have written at length about "resource curse", a curious phenomenon wherein countries and regions well endowed with resources are often the worst performers when it comes to various human development indicia. In comparison with countries dependant on agricultural exports, or whose development paradigm is founded upon broadbased development of human resources of all segments of the population, such countries and regions suffer from "unusually high poverty,
- d poor health care, widespread malnutrition, high rates of child mortality, low life expectancy and poor educational performance"⁵.

- e 15. Predatory forms of capitalism, supported and promoted by the State in direct contravention of the constitutional norms and values, often take deep roots around the extractive industries. In India too, we find a great frequency of occurrence of more volatile incidents of social unrest, historically, and in the present, in resource-rich regions, which paradoxically also suffer from low levels of human development. The argument that such a development paradigm is necessary, and its consequences inevitable, is untenable.

- f 16. The Constitution itself, in no uncertain terms, demands that the State shall strive, incessantly and consistently, to promote fraternity amongst all citizens such that dignity of every citizen is protected, nourished and promoted. The directive principles, though not justiciable, nevertheless "fundamental in the governance of the country", direct the State to utilise the material resources of the community for the common good of all, and not just of the rich and the powerful without any consideration of the human suffering that extraction of such resources impose on those who are sought to
- g be dispossessed and disempowered. Complete justice—social, economic and political—is what our Constitution promises to each and every citizen. Such a promise, even in its weakest form and content, cannot condone policies that turn a blind eye to deliberate infliction of misery on large segments of our population.

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⁵ Joseph E. Stiglitz, "Making Natural Resources into a Blessing Rather Than a Curse" in Svetlana Tsilik and Arya Schiffrin (Eds.), "Covering Oil" (Open Society Institute, 2005).

17. Policies of rapid exploitation of resources by the private sector, without credible commitments to equitable distribution of benefits and costs, and environmental sustainability, are necessarily violative of principles that are "fundamental to governance", and when such a violation occurs on a large scale, they necessarily also eviscerate the promise of equality before law, and equal protection of the laws, promised by Article 14, and the dignity of life assured by Article 21. Additionally, the collusion of the extractive industry, and in some places it is also called the mining mafia, and some agents of the State, necessarily leads to evisceration of the moral authority of the State, which further undermines both Article 14 and Article 21. As recognised by the Expert Committee of the Planning Commission, any steps taken by the State, within the paradigm of treating such volatile circumstances as simple law and order problems, to perpetrate large-scale violence against the local populace, would only breed more insurgency, and ever more violent protests.

18. Some scholars have noted that complexities of varieties of political violence in India are rooted:

"as much in the economic relations of the country as in its stratified social structure.... [E]ntrenched feudal structures, emerging commercial interests, new alliances and the nexus between entrenched order, new interests, political elites and the bureaucracy, and deficient public infrastructure and facilities perpetuate exploitation. The resulting miseries have made these sections of the population vulnerable to calls for revolutionary politics.... India's development dichotomy has also had a destabilising impact on people's settled lives. For decades, the Indian State has failed to provide alternative livelihoods to those displaced by developmental projects. According to an estimate, between 1951 and 1990, 8.5 million members of STs were displaced by developmental projects. Representing over 40% of all the displaced people, only 25% of them were rehabilitated.... Although there are no definitive data, Dalits and Adivasis have been reported to form a large proportion of the Maoists' foot soldiers.... A study of atrocities against these two sections of society reveals correspondence between the prevalence and spread of Naxalism and the geographic location of atrocities.... The susceptibility of the vulnerable continues under the new emerging context of the liberalisation, marketisation and globalisation of the Indian economy, which have added new dominance structures to the existing ones."³

19. What is ominous, and forebodes grave danger to the security and unity of this nation, the welfare of all of our people, and the sanctity of our constitutional vision and goals, is that the State is drawing the wrong conclusions, as pointed out by the expert group of the Planning Commission cited earlier. Instead of locating the problem in the socio-economic matrix, and the sense of disempowerment wrought by the false developmental paradigm without a human face, the powers that be in India are instead propagating the view that this obsession with economic growth is our only

³ Ajay K. Mehra, "Maoism in a globalising India" in Jorge Heine & Ramesh Thakur (Eds.), *The Dark Side of Globalisation* (United Nations University Press, 2011).

path, and that the costs borne by the poor and the deprived, disproportionately, are necessary costs.

a 20. Amit Bhaduri, a noted economist, has observed:

"If we are to look a little beyond our middle class noses, beyond the world painted by mainstream media, the picture is less comforting, less assuring.... Once you step outside the charmed circle of a privileged minority expounding on the virtues of globalisation, liberalisation and privatisation, things appear less certain.... According to the estimate of the Ministry of Home Affairs, some 120 to 160 out of a total of 607 districts are 'Naxal infested'. Supported by a disgruntled and dispossessed peasantry, the movement has spread to nearly one-fourth of Indian territory. And yet, all that this Government does is not to face the causes of the rage and despair that nurture such movements; instead it considers it a menace, a law and order problem ... that is to be rooted out by the violence of the State, and congratulates itself when it uses violence effectively to crush the resistance of the angry poor.... For the sake of higher growth, the poor in growing numbers will be left out in the cold, undernourished, unskilled and illiterate, totally defenceless against the ruthless logic of a global market.... [T]his is not merely an iniquitous process. High growth brought about in this manner does not simply ignore the question of income distribution, its reality is far worse. It threatens the poor with a kind of brutal violence in the name of development, a sort of 'developmental terrorism', violence perpetrated on the poor in the name of development by the State primarily in the interest of corporate aristocracy, approved by the IMF and the World Bank, and a self-serving political class.... Academics and media persons have joined the political chorus of presenting the developmental terrorism as a sign of progress, an inevitable cost of development. The conventional wisdom of our time is that, There Is No Alternative.... And yet this so widely agreed upon model of development is fatally flawed. It has already been rejected and will be rejected again by the growing strength of our democratic polity, and by direct resistance of the poor threatened with 'developmental terrorism'." (emphasis supplied)

21. As if the above were not bad enough, another dangerous strand of governmental action seems to have been evolved out of the darkness that has begun to envelope our policy-makers, with increasing blindness to constitutional wisdom and values. On the one hand the State subsidises the private sector, giving it tax break after tax break, while simultaneously citing lack of revenues as the primary reason for not fulfilling its obligations to provide adequate cover to the poor through social welfare measures. On the other hand, the State seeks to arm the youngsters amongst the poor with guns to combat the anger, and unrest, amongst the poor. Tax breaks for the rich, and guns for the youngsters amongst poor, so that they keep fighting amongst themselves, seems to be the new mantra from the mandarins of security and high economic policy of the State. This, apparently, is to be the grand vision for the development of a nation that has constituted itself as a sovereign,

secular, socialist and democratic republic. Consequently, questions necessarily arise as to whether the policy-makers, and the powers that be, are in any measure being guided by constitutional vision, values, and limitations that charge the State with the positive obligation of ensuring the dignity of all citizens. a

22. What the mandarins of high policies forget is that a society is not a forest where one could combat an accidental forest fire by starting a counter forest fire that is allegedly controlled. Human beings are not individual blades of dry grass. As conscious beings, they exercise a free will. Armed, the very same groups can turn, and often have turned, against other citizens, and the State itself. Recent history is littered with examples of the dangers of armed vigilante groups that operate under the veneer of State patronage or support. Such misguided policies, albeit vehemently and muscularly asserted by some policy-makers, are necessarily contrary to the vision and imperatives of our Constitution which demands that the power vested in the State, by the people, be only used for the welfare of the people—all the people, both rich and the poor—thereby assuring conditions of human dignity within the ambit of fraternity amongst groups of them. Neither Article 14, nor Article 21, can even remotely be conceived as being so bereft of substance as to be immune from such policies. They are necessarily tarnished, and violated in a primordial sense by such policies. b c d

23. The creation of such a miasmic environment of dehumanisation of youngsters of the deprived segments of our population, in which guns are given to them rather than books, to stand as guards for the rapine, plunder and loot in our forests, would be to lay the road to national destruction. It is necessary to note here that this Court had to intercede and order the Government of Chhattisgarh to get the security forces to vacate the schools and hostels that they had occupied; and even after such orders, many schools and hostels still remain in the possession and occupancy of the security forces. Such is the degree of degeneration of life, and society. Facts speak for themselves. e

24. Analysing the causes for failure of many nation-States, in recent decades, Robert I. Rotberg, a Professor of the Kennedy School, Harvard University, posits the view that "[N]ation-States exist to provide a decentralized method of delivering political (public) goods to persons living within designated parameters (borders).... They organize and channel the interests of their people, often but not exclusively in furtherance of national goals and values." Amongst the purposes that nation-States serve, that are normatively expected by citizenries, are included the task of buffering or manipulation of "external forces and influences", and mediation between "constraints and challenges" of the external and international forces and the dynamics of "internal economic, political, and social realities". In particular he notes: f g

"States succeed or fail across all or some of these dimensions. But it is according to their performance—according to the levels of their h

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- a effective delivery of the most crucial political goods—that strong States may be distinguished from weak ones, and weak States from failed or collapsed States.... There is a hierarchy of political goods. None is as crucial as the supply of security, especially human security. Individuals alone, almost exclusively in special or particular circumstances, can attempt to secure themselves. Or groups of individuals can band together to organize and purchase goods or services that maximize their sense of security. Traditionally, and usually, however, individuals and groups cannot easily or effectively substitute private security for the full spectrum of public security. The State's prime function is to provide that political good of security—to prevent cross-border invasions and infiltrations, to eliminate domestic threats to or attacks upon the national order and social structure ... and to stabilize citizens to resolve their disputes with the State and with their fellow human inhabitants without recourse to arms or other forms of physical coercion.”⁶
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(emphasis supplied)

25. The primary task of the State is the provision of security to all its citizens, without violating human dignity. This would necessarily imply the undertaking of tasks that would prevent the emergence of great dissatisfaction, and disaffection, on account of the manner and mode of extraction, and distribution, of natural resources and organisation of social action, its benefits and costs. Our directive principles of State policy explicitly recognise this. Our Constitution posits that unless we secure for our citizens conditions of social, economic and political justice for all who live in India, we would not have achieved human dignity for our citizens, nor would we be in a position to promote fraternity amongst groups of them.
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- e Policies that run counter to that essential truth are necessarily destructive of national unity and integrity.

26. To pursue socio-economic policies that cause vast disaffection amongst the poor, creating conditions of violent politics is a proscribed feature of our Constitution. To arrive at such a situation, in actuality on account of such policies, and then claim that there are not enough resources to tackle the resulting socio-political unrest, and violence, within the framework of constitutional values amounts to an abdication of constitutional responsibilities. To claim that resource crunch prevents the State from developing appropriate capacity in ensuring security for its citizens through well-trained formal police and security forces that are capable of working within the constitutional framework would be an abandonment of a primordial function of the State. To pursue policies whereby guns are distributed amongst barely literate youth amongst the poor to control the disaffection in such segments of the population would be tantamount to sowing of suicide pills that could divide and destroy society. Our youngsters are our most precious resource, to be nurtured for a better tomorrow. Given the endemic inequalities in our country, and the fact that we are increasingly,
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h ⁶ “The Failure and Collapse of Nation-States—BREAKDOWN, PREVENTION AND FAILURE” in Robert J. Rotberg (Ed.), “WHEN STATES FAIL: CAUSES AND CONSEQUENCES” (Princeton University Press, 2004).

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in a demographic sense, a young population, such a policy can necessarily be expected to lead to national disaster.

27. Our Constitution is most certainly not a "pact for national suicide"⁷. In the least, its vision does enable us, as constitutional adjudicators to recognise, and prevent, the emergence, and the institutionalisation, of a policing paradigm, the end point of which can only mean that the entire nation, in short order, might have to gasp: "The horror! The horror!"

28. It is in light of the above that we necessarily have to examine the issues discussed below, and pass appropriate orders. We have heard at length the learned Senior Counsel, Shri Ashok H. Desai, appearing on behalf of the petitioners, and learned Senior Counsel, Shri Harish N. Salve and Shri M.N. Krishnamani appearing for the State of Chhattisgarh. We have also heard learned Solicitor General of India, Shri Gopal Subramaniam, appearing for the Union of India.

PART II

Brief facts and history of instant matters

29. The instant writ petition was filed in 2007, by: (i) Dr. Nandini Sundar, a Professor of Sociology at Delhi School of Economics, and the author of *Subalterns and Sovereigns: An Anthropological History of Bastar* (2nd Edn., 2007); (ii) Dr. Ramachandra Guha, a well-known historian, environmentalist and columnist, and author of several books, including *Savaging the Civilised: Verrier Elwin, His Tribals and India* (1999) and *India After Gandhi* (2007); and (iii) Mr E.A.S. Sarma, former Secretary to the Government of India, and former Commissioner, Tribal Welfare, Government of Andhra Pradesh. The petitioners have alleged, inter alia, widespread violation of human rights of people of Dantewada District, and its neighbouring areas in the State of Chhattisgarh, on account of the ongoing armed Maoist/Naxalite insurgency, and the counter-insurgency offensives launched by the Government of Chhattisgarh. In this regard, it was also alleged that the State of Chhattisgarh was actively promoting the activities of a group called "Salwa Judum", which was in fact an armed civilian vigilante group, thereby further exacerbating the ongoing struggle, and was leading to further widespread violation of human rights.

30. This Court, had previously passed various orders as appropriate at the particular stage of hearing. It had previously noted that it would be appropriate for the National Human Rights Commission (NHRC) to verify the serious allegations made by the petitioners, by constituting a committee for investigation, and make the report available to this Court. On 25-8-2008 NHRC filed its report. This Court then directed that the Government of Chhattisgarh consider the recommendations. This Court also directed that appropriate first information reports (FIRs) be filed with respect to killings or other acts of violence and commission of crimes, where the FIRs had not been registered. The Government of Chhattisgarh was further directed, in the

⁷ Aharon Barack, *The Judge in a Democracy* (Princeton University Press, 2006).

- case of finding the dead body of a person, to ensure that a magisterial enquiry follows, and file an "Action Taken Report". In the order dated 18-2-2010, this
- a Court stated that "[I]t appears that about 3000 SPOs", (Special Police Officers) "have been appointed by the State Government to take care of the law and order situation, in addition to the regular police force. We make it clear that the appointment of SPOs shall be done in accordance with law". The Court also specifically recorded that "[I]t is also denied emphatically by the State that private citizens are provided with arms."
- b 31. In the course of the continuing hearings, before us, a number of allegations have been made, certain of the findings of NHRC stressed, and some contested. Three aspects were particularly dealt with by us, and they relate to:
- c (i) the issue of schools and hostels in various districts of Chhattisgarh being occupied by various security forces, in a manner that precludes the proper education of students of such schools;
- d (ii) the issue of nature of employment of SPOs, also popularly known as Koya Commandos, the manner of their training, their status as police officers, the fact that they are provided with firearms, and the various allegations of the excessive violence perpetrated by such SPOs; and
- e (iii) fresh allegations made, this time by Swami Agnivesh, that some 300 houses were burnt down in the villages of Morpalli, Tadmetla and Timnapuram, women raped and three men killed sometime in March 2011. It was also alleged that when Swami Agnivesh, along with some other members of the civil society, tried to visit the said villages to distribute humanitarian aid, and gain first-hand knowledge of the situation, they were attacked by members of "Salwa Judum" in two separate incidents, and that, notwithstanding assurances by the Chief Minister of Chhattisgarh that they will be provided all the security to be able to undertake their journey and complete their tasks, and notwithstanding the presence of security forces, the attacks were allowed to be perpetrated.
- f 32. Swami Agnivesh, it is also reported, and prima facie appears, is a social activist, of some repute, advocating the path of peaceful resolution of social conflict. It also appears that Swami Agnivesh has actually worked towards the release of some police personnel who had been kidnapped by Naxalites in Chhattisgarh, and the same has also been acknowledged by a person no less than the Chief Minister of Chhattisgarh.
- g 33. With respect to the issue of the schools and hostels occupied by the security forces, it may be noted that the State of Chhattisgarh had categorically denied that any schools, hospitals, ashrams and Anganwadis were continuing to be occupied by security forces, and in fact all such facilities had been vacated. However, during the course of the hearings before this Bench it has turned out that the facts asserted in the earlier affidavit were
- h erroneous, and that in fact a large number of schools had continued to be occupied by security forces. It was only upon the intervention, and directions,

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of this Court did the State of Chhattisgarh begin the process of releasing the schools and hostels from the occupation by the security forces. That process is, in fact, still ongoing.

34. We express our reservations at the manner in which the State of Chhattisgarh has conducted itself in the instant proceedings before us. It was because of the earlier submissions made to this Court that schools, hospitals, ashrams and Anganwadis have already been vacated, this Court had passed earlier orders with respect to other aspects of the recommendations of NHRC, and did not address itself to the issue of occupancy by security forces of such infrastructure and public facilities that are necessary and vital for public welfare. A separate affidavit has been filed by the State of Chhattisgarh seeking an extension of time to comply with the directions of this Court. This is because a large number of schools and hostels still continue to be occupied by the security forces. We will deal with the said matter separately.

35. It is with respect to the other two matters i.e. (i) appointment of SPOs; and (ii) incidents alleged by Swami Agnivesh which we shall deal with below.

36. At this point it is also necessary to note that the ongoing armed insurgency in Chhattisgarh, and in various other parts of the country, have been referred to as both Maoist and Naxal or Naxalite activities, by the petitioners as well as the respondents. Such terms are used interchangeably, and refer to, broadly, armed uprisings of various groups of people against the State, as well as individual or groups of citizens. In this order, we refer to Maoist activities, and the Naxal or Naxalite activities interchangeably.

PART III

Appointment and conditions of service of SPOs

37. A number of allegations with regard to functioning of "Koya Commandos" had been made by the petitioners, and upon being asked by this Court to explain who or what Koya Commandos were, the State of Chhattisgarh, through two separate affidavits, and one written note, stated, asserted and/or submitted:

(i) that, between 2004 to 2010, 2298 attacks by Naxalites occurred in the State, and 538 police and paramilitary personnel had been killed; that in addition 169 Special Officers, 32 government employees (not police) and 1064 villagers had also been killed in such attacks; that "SPOs form an integral part of the overall security apparatus in the Naxal affected districts of the State;" and that the Chintalnagar area of Dantewada District is the worst affected area, with 76 security personnel killed in one incident.

(ii) that, as stated previously, in other affidavits, by the State of Chhattisgarh, Salwa Judum has run its course, and has ceased as a force, existing only symbolically; that the petitioners' and Shri Agnivesh's claim that Salwa Judum is still active in the form of SPOs and Koya

- a Commandos is misconceived; that the phrase "Koya Commando" is not an official one, and no one is appointed as a Koya Commando; that some of SPOs are from Koya tribe, and hence, loosely, the term "Koya Commando" is used; that previously SPOs used to be appointed by the District Magistrate under Section 17 of the Police Act, 1861 (IPA); that SPOs appointed under the said statute drew their power, duties and accountability under Section 18 of the IPA; and that with the enactment of the Chhattisgarh Police Act, 2007 (CPA, 2007), SPOs are now appointed under Section 9 of the CPA, 2007; that SPOs are paid a monthly honorarium of Rs 3000, of which 80% is contributed by Government of India; that SPOs are appointed to act as guides, spotters and translators, and work as a source of intelligence, and firearms are provided to them for their self-defence; that many other States have also appointed SPOs, and Naxals oppose SPOs because their familiarity with local people, dialect and terrain make them effective against them; that the total number of SPOs appointed in Chhattisgarh, and approved by the Union of India, were 6500 as of 28-3-2011. (It may be noted that an year ago the State of Chhattisgarh had informed this Court that the total number of SPOs appointed in Chhattisgarh were 3000. The much higher figure of appointed SPOs, as revealed by the latest affidavit implies that the number been more than doubled in the span of one year.)
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38. Upon the submission of the affidavit containing the above details, we pointed out a number of issues which had not been addressed by the State of Chhattisgarh. Some of the important queries raised by us, with directions to the State of Chhattisgarh and the Union of India to answer, inter alia, included:

- e (i) the required qualifications for such an appointment;
(ii) the manner and extent of their training, especially given the fact that they were to wield firearms;
(iii) the mode of control of the activities of such SPOs by the State of Chhattisgarh;
- f (iv) what special provisions were made to protect SPOs and their families in the event of serious injuries or death while performing their "duties"; and
(v) what provisions and modalities were in place for discharge of an appointed SPO from duty and the retrieval of the firearms given to them in line of their duties, and also with regard to their safety and security after performing their duties as SPOs for a temporary period.
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39. In this regard, the State of Chhattisgarh submitted an additional affidavit filed on 3-5-2011, and subsequently after we had reserved this matter for orders, submitted a written note dated 11-3-2011 on 16-5-2011. The same are summarised briefly below:

- h (i) That the Union of India approves the upper limit of the number of SPOs for each State for the purposes of reimbursement of honorarium under the Security Rated Expenditure (SRE) Scheme.

(ii) That currently the State of Chhattisgarh recruits SPOs under Section 9(1) of the Chhattisgarh Police Act, 2007, and that the SPOs, pursuant to Section 9(2) of the CPA, 2007, enjoy the "same powers, privileges and perform same duties as coordinate constabulary and subordinate of Chhattisgarh Police;" that SPOs are an integral part of the police force of Chhattisgarh, and they are "under the same command, control and supervision of the Superintendent of Police as any other police officer. SPOs are subjected to the same discipline and are regulated by the same legal framework as any other police officer..." that 1200 SPOs have been suspended, and even their tenure not renewed or extended if found to be derelict in the performance of their duties. (However, in the written note it has been stated that SPOs "are" appointed under Section 17 of the IPA, 1861).

(iii) That SPOs serve as "auxiliary force and force multiplier;" that appointments of SPOs has been recommended by the Second Administrative Reforms Commission under the chairmanship of Mr M. Veerappa Moily.

(iv) That SPOs serve a critical role in mitigating the problem of inadequacy of regular police and other security forces in Chhattisgarh; that a three-man committee appointed by the Government of Chhattisgarh, in 2007, to prepare an action plan to combat the Naxalite problem, had calculated the requirement to be seventy (70) battalions; as against this, at present the State only has a total of 40 battalions, of which 24 are Central Armed Police Force, 6 Indian Reserve Force and 10 State battalions; that the shortfall is 30 battalions.

(v) That the appointment of SPOs is necessary because of the attacks against relief camps for displaced villagers by Naxals; that the total number of attacks by Maoists between 2005 to 2011 were 41, in which 47 persons were killed and 37 injured, with figures in Dantewada being 24 attacks, 37 persons killed and 26 injured; that tribal youth are joining the ranks of SPOs "motivated by the urge for self-protection and to defend their family members/villages from violent attacks;" that "[T]he victims of Naxal violence and youth from Naxal affected areas having knowledge of the local terrain, dialects, Naxalites and their sympathisers and who voluntarily come forward and expressed their willingness are recruited as SPOs after character verification;" and that such tribal youth are recruited as SPOs on a temporary basis, by the Superintendent of the Police on the recommendation of the station-in-charge concerned and gazetted police officers.

(vi) That even though IPA, 1861 and CPA, 2007 do not prescribe any qualifications, "preference is given to those who have passed fifth standard" in the appointment of SPOs; that persons aged over 18 and aware of the local geography are appointed; and that the same is done in accordance with prescribed guidelines.

(vii) That a total training of two months is provided to such tribal youth appointed as SPOs, including; (a) musketry weapon handling; (b) first aid and medical care; (c) field and craft drill; (d) UAC and yoga training; and that apart from the foregoing, "basic elementary knowledge" of various subjects are also included in the training curriculum; (e) Law (including IPC, CrPC, Evidence Act, Minors Act, etc.) in 24 periods; (f) human rights and other provisions of the Constitution of India in 12 periods; (g) use of scientific and forensic aids in policing in 6 periods; (h) community policing in 6 periods; and (i) culture and customs of Bastar in 9 periods; that timetable of such training, in which each period was shown to be one hour of classroom instruction, submitted to this Court, is evidence of the same.

(viii) That upon training, SPOs are deployed in their local areas and work under police leadership, and that the District Superintendent of Police commands and controls these SPOs through SHO/SDOP/Addl. SP; that in the past, 1200 SPOs have been discharged from service, for absence from duty and other indiscipline; that FIRs have been registered against 22 SPOs for criminal acts, and action taken as per law.

(ix) That "between the year 2005 to April 2011", 173 SPOs "have sacrificed their lives while performing their duties and 117 SPOs received injuries;" that certain provisions have been made to give relief and rehabilitation to SPO's next of kin in case of death and/or injuries, such as payment of ex gratia.

(x) That inasmuch as most of the security personnel in Chhattisgarh, engaged in fighting Naxalites, are from outside the State, lack of knowledge about local terrain, geography, culture and information regarding who is a Naxal sympathiser, a Naxal, etc., is hampering the State; that local SPOs prove to be invaluable because of their local knowledge; and that as local officers on duty in relief camps, etc., SPOs have been able to thwart more than a dozen Maoist attacks on relief camps and have also been instrumental in saving lives of regular troops.

(xi) That SPOs are "looked after as part of regular force and their welfare is taken care of by the State;" and that by way of examples and evidence of the same, may be cited the special relaxation given to victims of Naxal violence in recruitment of constables by Chhattisgarh Government, and the fact that more than 700 SPOs who have passed the recruitment test have been appointed as constables.

(xii) That State of Chhattisgarh has framed Special Police Officers (Appointment, Training and Conditions of Service) Regulatory Procedures, 2011 dated 6-5-2011. (New Regulatory Procedures).

40. It should be noted at this stage itself that the said rules, in the New Regulatory Procedures, have been framed after this Court had heard the matter and reserved it for directions. It is claimed in the written note of 16-5-2011 that "the idea behind better schedule of training for the SPOs is to make the SPOs more sensitised to the problems faced by local tribals. SPOs

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also play a crucial role in bringing back alienated tribals back to the mainstream". It is also further argued in the written note that the "disbanding of SPOs as sought by the petitioners would wreak havoc with law and order in the State of Chhattisgarh" and that the State of Chhattisgarh "intends to improve the training programme imparted to SPOs so as to have an effective and efficient police force" and that the New Regulatory Procedures have been framed to achieve the same. a

41. The State of Chhattisgarh also placed great reliance on the affidavit submitted by the Union of India, dated 3-5-2011, with regard to the appointment, service and training of SPOs, and also the broad policy statements made by Union of India as to how the Left Wing Extremism (LWE) ought to be tackled. To this effect, the affidavit of the Union of India is briefly summarised below: b

(i) Police and public order are State subjects, and the primary responsibility of the State Government; however, in special cases the Central Government supplements the efforts of the State Governments through the SRE Scheme. The Scheme it is said has been developed to help States facing acute security problems, including LWE, that at present it covers 83 districts in nine States, including Chhattisgarh. Under the said SRE Scheme, the Union of India reimburses certain security related activities by the State to enable "capacity building". It is also stated that the "honorarium" paid to SPOs varies from State to State, with varying percentages of reimbursement of actual paid honorarium. The highest amount reimbursed is Rs 3000 and the lower range is around Rs 1500. c

(ii) The Union of India also categorically asserted, as far as appointment and functioning of SPOs are concerned, that its role is "limited to the approval of upper limit of the number of SPOs for each State for the purpose of reimbursement of the honorarium under the SRE scheme" and that the "appointment, training, deployment, role and responsibility" of the SPOs are determined by the State Governments concerned. The Union of India categorically states that the State Governments "may appoint SPOs in accordance with law irrespective of the Government of India, Ministry of Home Affairs approval". d

(iii) The Union of India asserted that "historically SPOs have played an important role in law and order and insurgency situations in different States". In this regard, in the context of Left Wing Extremism, the Union of India, in its affidavit also pointedly remarks that the "*Peoples Liberation Guerrilla Army ... has raised and uses an auxiliary force known as 'Jan Militia' recruited from amongst the local people, who have knowledge of the local terrain, dialect, and also have the familiarity with the local population. The logic behind State Governments recruiting SPOs is to counter the advantage since SPOs are also locally recruited and are familiar with the terrain, dialect and the local population*" and e

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that Government of India partially reimburses honorarium of around 70,046 SPOs appointed by different States under the SRE Scheme.

- a 42. It would be necessary to note at this stage that it is not clear from the affidavit of the Union of India as to what stance it takes with respect to specific aspects of the use of SPOs in Chhattisgarh—arming SPOs with arms, the nature of training provided to them, and the duties assigned to them. In a markedly vague manner, the Union of India's affidavit asserts that SPOs are "force multipliers" not explaining what is involved in such a concept, nor
- b how "force" is multiplied, or not, depending on various duties of SPOs, their training, and whether they carry arms or not. Without explaining that concept, the Union of India asserts that SPOs have played a useful role in collection of intelligence, protection of local inhabitants and ensuring security of property in disturbed areas.

- c 43. Giving examples of what Union of India claims to be indicia of the usefulness of SPOs, the Union of India makes three other assertions:

- (i) that the "assistance to District Police is crucial since they have a stable presence unlike Army/CPMFs which are withdrawn/relocated frequently";
- (ii) that the Union of India requires that SPOs be treated, legally, "on a par with ordinary police officers in respect of matters such as powers, penalties, subordination, etc."; and
- d (iii) that the "role of SPOs has great relevance in operational planning by the State Governments in counter-insurgency and counter-terrorism situations as well as in law and order situations".

- e 44. In addition, it was also further asserted by the Union of India that "it is necessary to enhance the capacity of security forces in the affected States. Despite the many steps taken by the State Governments concerned, CPI (Maoist) has indulged in indiscriminate and wanton violence". To this effect, the Union of India states that in the year 2010 a total of 1003 people, comprising 718 civilians and 285 personnel of the security forces were killed by Naxalite groups all over India; and of the civilians killed, 323 were killed
- f on being branded as "police informers".

45. For good measure, the Union of India ends its affidavit with the following:

- g "The Government of India is committed to respecting the human rights of innocent citizens. The Government of India has always impressed upon the State Governments that while dealing with violence perpetrated by CPI (Maoist), the security forces should act with circumspection and restraint. The Government of India will issue advisories to the State Governments to recruit constables and SPOs after careful screening and verification, improve the standards of training, impart instruction on human rights; and direct the supervisory officers to enforce strict discipline and adherence to the law among constables and
- h SPOs while conducting operations in affected areas."

Analysis

46. At this stage it is necessary to note the main statutory provisions under which it is asserted that SPOs are appointed and which govern their role, duties, etc. They are: a

Section 17 of the Police Act, 1861:

"17. *Special Police Officers*.—When it shall appear that any unlawful assembly, or riot or disturbance of the peace has taken place, or may be reasonably apprehended, and that the police force ordinarily employed for preventing the peace is not sufficient for its preservation and for the protection of the inhabitants and the security of property in the place where such unlawful assembly or riot or disturbance of the peace has occurred, or is apprehended, it shall be lawful for any police officer not below the rank of Inspector to apply to the nearest Magistrate to appoint so many of the residents of the neighbourhood as such police officers may require to act as Special Police Officers for such time and within such limits as he shall deem necessary; and the Magistrate to whom such application is made shall, unless he sees cause to the contrary, comply with the application." b

Section 18 of the Police Act, 1861:

"18. *Powers of Special Police Officers*.—Every Special Police Officer so appointed shall have the same powers, privileges and protection, and shall be liable to perform the same duties and shall be amenable to the same penalties, and be subordinate to the same authorities, as the ordinary officers of police." c

Section 19 of the Police Act, 1861:

"19. *Refusal to serve as Special Police Officers*.—If any person being appointed a Special Police Officer as aforesaid shall without sufficient excuse, neglect or refuse to serve as such, or to obey such lawful order or direction as may be given to him for the performance of his duties, he shall be liable, upon conviction before a Magistrate, to a fine not exceeding fifty rupees for every such neglect, refusal or disobedience." d

47. In the year 2007, the State of Chhattisgarh enacted the Chhattisgarh Police Act, 2007 and some relevant portions of the same are noted below:

Section 1(2):

"1. (2) It shall come into force from the date of its publication in the Official Gazette." e

"2. (h) 'police officer' means any member of the police force appointed under this Act or appointed before the commencement of this Act for the State and includes members of the Indian Police Service or members of any other police organisation on deputation to the State police, serving for the State and persons appointed under Section 9 or 10 of this Act; f

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(k) 'prescribed' means prescribed by rules; g

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(o) 'Rules' means the rules made under the Act; h

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9. Special Police Officers.—(1) Subject to Rules prescribed in this behalf, the Superintendent of Police may at any time, by an order in writing, appoint any person to act as a Special Police Officer for a period as specified in the appointment order.

(2) Every Special Police Officer so appointed shall have the same powers, privileges and protection, and shall be liable to perform the same duties and shall be amenable to the same penalties, and be subordinate to the same authorities, as the ordinary officers of the police.

23. Role, functions and duties of the police.—The following shall be the functions and responsibilities of a police officer,—

(1)(a) to enforce the law, and to protect life, liberty, property, rights and dignity of the people;

(b) to prevent crime and public nuisance;

(c) to maintain public order;

(d) to preserve internal security, prevent and control terrorist activities and to prevent breach of public peace;

(e) to protect public property;

(f) to detect offences and bring the offenders to justice;

(g) to arrest persons whom he is legally authorised to arrest and for whose arrest sufficient grounds exist;

(h) to help people in situations arising out of natural or man-made disasters, and to assist other agencies in relief measures;

(i) to facilitate orderly movement of people and vehicles, and to control and regulate traffic;

(j) to gather intelligence relating to matters affecting public peace and crime;

(k) to provide security to public authorities in discharging their functions;

(l) to perform all such duties and discharge such responsibilities as may be enjoined upon him by law or by an authority empowered to issue such directions under any law.

24. Police officers always on duty and may be employed in the State or deployed outside the State.—Every police officer shall be considered to be always on duty, when employed as a police officer in the State or deployed outside the State.

25. Police officers not to engage in other employment.—No police officer may engage in an employment or office whatsoever, other than his duties under this Act, unless expressly permitted to do so in writing by the State Government.

50. Power to make Rules.—(1) The State Government may make rules for carrying out the purposes of this Act:

Providing that existing State Police regulations shall continue to be in force till altered or repealed.

(2) All rules made under this Act shall be laid before the State Legislature as soon as possible.

* * *

53. Repeal and saving.—(1) The Indian Police Act (5 of 1861) in its applicability to the State of Chhattisgarh is hereby repealed." a

It is noted that neither Section 9(1) nor Section 9(2) specify the conditions or circumstances under which the Superintendent of Police may appoint "any person" as a "Special Police Officer". That would be a grant of discretion without any indicia or specification of limits, either as to the number of SPOs who could be appointed, their qualifications, their training or their duties. Conferment of such unguided and uncanalised power, by itself, would clearly be in the teeth of Article 14, unless the provisions are read down so as to save them from the vice of unconstitutionality. b

48. The provisions of Sections 9(1) and 9(2) of the CPA, 2007 may be contrasted with Section 17 of the IPA, 1861 a British era legislation, which sets forth the circumstances under which such appointments could be made, and the conditions to be fulfilled. No such description of circumstances has been made in Section 9(1) or Section 9(2) of the CPA, 2007. In the same manner, the functions and responsibilities as provided in Section 23 of the CPA, 2007, so far as they are construed as being the responsibilities that may be undertaken by SPOs, except those contained in Section 23(1)(h) and Section 23(1)(i) have also to be read down. c
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49. Even though the State of Chhattisgarh has submitted its New Regulatory Procedures, notified, after this Court had heard the matter at length, we have reviewed the same. We are neither impressed by the contents of the New Regulatory Procedures, nor have such New Regulatory Procedures inspired any confidence that they will make the situation any better. e

50. Some of the features of these new rules are summarised as follows. The circumstances specified for appointment of SPOs include the occurrence of "terrorist/extremist" incidents or apprehension that they may occur. With regard to eligibility, the rules state that, if other qualifications are same, "person having passed 5th class shall be given preference". Furthermore, the rules specify that SPO should be "capable of assisting the police in prevention and control of the particular problem of the area". Inasmuch as "terrorist/extremist" incidents and activities are included in the circumstances i.e. the particular problem of the area, it is clear that SPOs are intended to be appointed with the responsibilities of engaging in counter-insurgency activities. In point of fact, the language of the rules now indicate that their role need not be limited only to being spotters, and guides and the like, but may also include direct combat role with terrorists/extremists. Furthermore, training is to be given to those appointed as SPOs if and only if the Superintendent of the Police is "of the opinion that training is essential for him", and in any case training will be imparted only if the appointed person has been appointed for a minimum period of one year and is to be given firearms for self-defence. Such training will be in "Arms, Human Rights and f
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- Law" for a minimum period of three months. The appointment is to be "totally temporary in nature", and the appointment may be terminated,
a "without giving any reason" by the Superintendent of Police. SPOs are to only receive an honorarium and other benefits as "sanctioned by the State Government from time to time".

51. We must at this point also express our deepest dismay at the role of the Union of India in these matters. Indeed it is true that policing, and law and order, are State subjects. However, for the Union of India to assert that its
b role, with respect to SPOs being appointed by the State of Chhattisgarh, is limited only to approving the total number of SPOs, and the extent of reimbursement of "honorarium" paid to them, without issuing directions as to how those SPOs are to be recruited, trained and deployed for what purposes is an extremely erroneous interpretation of its constitutional responsibilities in these matters. Article 355 specifically states that:

- c "355. *Duty of the Union to protect States against external and internal disturbance.*—It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution."

52. The Constitution casts a positive obligation on the State to undertake
d all such necessary steps in order to protect the fundamental rights of all citizens, and in some cases even of non-citizens, and achieve for the people of India, conditions in which their human dignity is protected and they are enabled to live in conditions of fraternity. Given the tasks and responsibilities that the Constitution places on the State, it is extremely dismaying that the Union of India, in response to a specific direction by this Court that it file an affidavit as to what its role is with respect to appointment of SPOs in
e Chhattisgarh, claim that it only has the limited role as set forth in its affidavit. Even a cursory glance at the affidavit of the Union of India indicates that it was filed with the purpose of taking legal shelter of diminished responsibility, rather than exhibiting an appropriate degree of concern for the serious constitutional issues involved.

53. The fact of the matter is, it is the financial assistance being given by
f the Union that is enabling the State of Chhattisgarh to appoint barely literate tribal youth as SPOs, and given firearms to undertake tasks that only members of the official and formal police force ought to be undertaking. Many thousands of them have been appointed, and they are being paid an "honorarium" of Rs 3000 per month, which the Union of India reimburses. That the Union of India has not seen it fit to evaluate the capacities of such
g tribal youth in undertaking such responsibilities in counter-insurgency activities against Maoists, the dangers that they will confront, and their other service conditions, such as the adequacy of their training, is clearly unconscionable.

54. The stance of the Union of India, from its affidavit, has clearly been
h that it believes that its constitutional obligations extend only to the extent of fixing an upper limit on the number of SPOs engaged, on account of the impact on its purse, and that how such monies are used by the State

Governments, is not their concern. In its most recent statement to this Court, much belated, the Union of India asserts that it will only issue "advisories to the State Governments to recruit constables and SPOs after careful screening and verification, improve the standards of training. Impart instruction on human rights...." This leads us to conclude that the Union of India had abdicated its responsibilities in these matters previously. The fact that even now it sees its responsibilities as consisting of only issuing of advisories to the State Governments does not lead to any confidence that the Union of India intends to take all the necessary steps in mitigating a vile social situation that it has, willy-nilly, played an important role in creating. a
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55. It is now clear to us, as alleged by the petitioners, that thousands of tribal youths are being appointed by the State of Chhattisgarh, with the consent of the Union of India, to engage in armed conflict with the Maoists/Naxalites. The facts as stated in the affidavits of the State of Chhattisgarh, and the Union of India themselves reveal that, contrary to the assertions that the tribal SPOs are recruited only to engage in non-combatant roles such as those of spotters, guides, intelligence gatherers, and for maintenance of local law and order, they are actually involved in combat with the Maoists/Naxalites. The fact that both the State of Chhattisgarh and the Union of India themselves acknowledge that the relief camps, and the remote villages, in which these SPOs are recruited and directed to work in, have been subject to thousands of attacks clearly indicates that in every such attack SPOs may necessarily have to engage in pitched battles with the Maoists. This is also borne out by the fact that both the Union of India and the State of Chhattisgarh have acknowledged that many hundreds of civilians have been killed by Maoists/Naxalites by branding them as "police informants". This would obviously mean that SPOs would be amongst the first targets of the Maoists/Naxalites, and not be merely occasional incidental victims of violence or subject to Maoist/Naxalite attacks upon accidental or chance discovery or infrequent discovery of their true role. The new rules in fact make the situation even worse, for they specify that the person appointed as an SPO "should be capable of assisting the police in prevention and control of the particular problem of the area", which include terrorist/extremist activities. There is no specification that they will be used in only non-combatant roles or roles that do not place them in direct danger of attacks by extremists/terrorists. c
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56. It is also equally clear to us, as alleged by the petitioners, that the lives of thousands of tribal youths appointed as SPOs are placed in grave danger by virtue of the fact that they are employed in counter-insurgency activities against the Maoists/Naxalites in Chhattisgarh. The fact that 173 of them have "sacrificed their lives" in this bloody battle, as cynically claimed by the State of Chhattisgarh in its affidavit, is absolute proof of the same. It should be noted that while 538 police and CAPF personnel have been killed, out of a total strength of 40 battalions of regular security forces, in the operations against Maoists in Chhattisgarh between 2004 and 2011, 173 SPOs i.e. young, and by and large functionally illiterate, tribals, have been g
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- killed in the same period. If one were to take, roughly, the strength of each battalion to be 1000 to 1200 personnel, the ratio of deaths of formal security personnel to total security personnel engaged is roughly 538 to about 45,000 to 50,000 personnel. That itself is a cause for concern, and a continuing tragedy. Given the fact that the strength of the SPOs till last year was only 3000 (and has now grown to 6500), the ratio of number of SPOs killed (173) to the strength of SPOs (3000 to 4000) is of a much higher order, and is unconscionable. Such a higher rate of death, as opposed to what the formal security forces have suffered, can only imply that these SPOs are involved in front line battles, or that they are, by virtue of their roles as SPOs, being placed in much more dangerous circumstances, without adequate safety of numbers and strength that formal security forces would possess.

57. It is also equally clear to us that in this policy, of using local youth, jointly devised by the Union and the States facing Maoist insurgency, as implemented in the State of Chhattisgarh, the young tribals have literally become cannon-fodder in the killing fields of Dantewada and other districts of Chhattisgarh. The training, that the State of Chhattisgarh claims it is providing those youngsters with, in order to be a part of the counter-insurgency against one of the longest lasting insurgencies mounted internally, and indeed may also be the bloodiest, is clearly insufficient. Modern counter-insurgency requires use of sophisticated analytical tools, analysis of data, surveillance, etc. According to various reports, and indeed the claims of the State itself, Maoists have been preparing themselves on more scientific lines, and gained access to sophisticated weaponry. That the State of Chhattisgarh claims that these youngsters, with little or no formal education, are expected to learn the requisite range of analytical skills, legal concepts and other sophisticated aspects of knowledge, within a span of two months, and that such a training is sufficient for them to take part in counter-insurgency against the Maoists, is shocking.

58. The State of Chhattisgarh has itself stated that in recruiting these tribal youths as SPOs "preference for those who have passed the fifth standard" has been given. This clearly implies that some, or many, who have been recruited as SPOs may not have even passed the fifth standard. Under the new rules, it is clear that the State of Chhattisgarh would continue to recruit youngsters with such limited schooling. It is shocking that the State of Chhattisgarh then turns around and states that it had expected such youngsters to learn, adequately, subjects such as IPC, CrPC, Evidence Act, Minors Act, etc. Even more shockingly the State of Chhattisgarh claims that the same was achieved in a matter of 24 periods of instruction of one hour each. Further, the State of Chhattisgarh also claims that in additional 12 periods, both the concepts of Human Rights and "other provisions of the Indian Constitution" have been taught. Even more astoundingly, it claims that it also taught them scientific and forensic aids in policing in 6 periods. The State of Chhattisgarh also claims, with regard to the new rules, that "the idea behind better schedule of training for SPOs is to make them more sensitised to the problems faced by local tribes". This is supposed to be achieved by

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increasing the total duration of training by an extra month, for youngsters who may or may not have passed the fifth class.

59. We hold that these claims are simply lacking in any credibility. Even if one were to assume, for the sake of argument, that such lessons are actually imparted, it would be impossible for any reasonable person to accept that tribal youngsters, who may, or may not, have passed the fifth standard, would possess the necessary scholastic abilities to read, appreciate and understand the subjects being taught to them, and gain the appropriate skills to be engaged in counter-insurgency movements against the Maoists.

60. The State of Chhattisgarh accepts the fact that many, and for all we know most, of these young tribals being appointed as SPOs have been provided firearms and other accoutrements necessary to bear and use such firearms, and will continue to be so provided in the future under the new rules. While the State of Chhattisgarh claims that they are being provided such arms only for self-defence, it is clear that given the levels of education that these tribal youth are expected to have had, and the training they are being provided, they would simply not possess the analytical and cognitive skills to read and understand the complex socio-legal dimensions that inform the concept of self-defence, and the potential legal liabilities, including serious criminal charges, in the event that the firearms are used in a manner that is not consonant with the concept of self-defence. Even if we were to assume, purely for the sake of argument, that these youngsters were being engaged as gatherers of intelligence or secret informants, the fact that by assuming such a role they are potentially placed in an endangered position vis-à-vis attacks by Maoists, they are obviously being put in volatile situations in which the distinctions between self-defence and unwarranted firing of a firearm may be very thin and requiring a high level of discretionary judgment. Given their educational levels it is obvious that they simply will not have the skills to make such judgments; and further because of low educational levels, the training being provided to them will not develop such skills.

61. The State of Chhattisgarh claims that they are only employing those tribal youths who volunteer for such responsibilities. It also claims that many of the youths who are coming forward are motivated to do so because they or their families have been victims of Naxal violence or want to defend their hearth and home from attacks by Naxals. We simply fail to see how, even assuming that the claims by the State of Chhattisgarh to be true, such factors would lessen the moral culpability of the State of Chhattisgarh, or make the situation less problematic in terms of human rights violations of the youngsters being so appointed as SPOs.

62. First and foremost given that their educational levels are so low, we cannot, under any conditions of reasonableness, assume that they even understand the implications of engaging in counter-insurgency activities bearing arms, ostensibly for self-defence, and being subject to all the disciplinary codes and criminal liabilities that may arise on account of their actions. Under modern jurisprudence, we would have to estimate the degree

a of free will and volition, with due respect to, and in the context of, the complex concepts they are being expected to grasp, including whether the training they are being provided is adequate or not for the tasks they are to perform. We do not find appropriate conditions to infer informed consent by such youngsters being appointed as SPOs. Consequently we will not assume that these youngsters, assuming that they are over the age of eighteen, have decided to join as SPOs of their own free will and volition.

b 63. Furthermore, the fact that many of those youngsters may be actuated by feelings of revenge, and reasonably expected to have a lot of anger, would militate against using such youngsters in counter-insurgency activities, and entrusted with the responsibilities that they are being expected to discharge. In the first instance, it can be easily appreciated that given the increasing sophistication of methods used by the Maoists, counter-insurgency activities would require a cool and dispassionate head, and demeanour to be able to
c analyse the current and future course of actions by them. Feelings of rage, and of hatred would hinder the development of such a dispassionate analysis. Secondly, it can also be easily appreciated that such feelings of rage, and hatred, can easily make an individual highly suspicious of everyone. If one of the essential tasks of such tribal youths as SPOs is the identification of Maoists, or their sympathisers, their own mental make-up, in all probability
d would or could affect the degree of accuracy with which they could make such identification. Local enmities, normal social conflict, and even assertion of individuality by others against overbearing attitude of such SPOs, could be a cause to brand persons unrelated to Maoist activities as Maoists, or Maoist sympathisers. This in turn would almost certainly vitiate the atmosphere in those villages, lead to situations of grave violation of human rights of innocent people, driving even more to take up arms against the State.
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f 64. Many of these tribal youngsters, on account of the violence perpetrated against them, or their kith and kin and others in the society in which they live, have already been dehumanised. To have feelings of deep rage and hatred, and to suffer from the same is a continuation of the condition of dehumanisation. The role of a responsible society, and those who claim to be concerned of their welfare, which the State is expected to
g under our Constitution, ought to be one of creating circumstances in which they could come back or at least tread the path towards normalcy, and a mitigation of their rage, hurt, and desires for vengeance. To use such feelings, and to direct them into counter-insurgency activities, in which those youngsters are placed in grave danger of their lives, runs contrary to the norms of a nurturing society. That some misguided policy-makers strenuously advocate this as an opportunity to use such dehumanised sensibilities in the fight against Maoists ought to be a matter of gravest constitutional concerns and deserving of the severest constitutional opprobrium.

h 65. It is abundantly clear, from the affidavits submitted by the State of Chhattisgarh, and by the Union of India, that one of the primary motives in employing tribal youths as SPOs is to make up for the lack of adequate formal security forces on the ground. The situation, as we have said before,

has been created, in large part by the socio-economic policies followed by the State. The policy of privatisation has also meant that the State has incapacitated itself, actually and ideologically, from devoting adequate financial resources in building the capacity to control the social unrest that has been unleashed. To use those tribal youngsters, as SPOs to participate in counter-insurgency actions against Maoists, even though they do not have the necessary levels of education and capacities to learn the necessary skills, analytical tools and gain knowledge to engage in such activities and the dangers that they are subjected to, clearly indicates that issues of finance have overridden other considerations such as effectiveness of such SPOs and of constitutional values. a

66. The State of Chhattisgarh claims that in providing such "employment" they are creating livelihoods, and consequently promoting the values enshrined in Article 21. We simply cannot comprehend how involving ill-equipped, barely literate youngsters in counter-insurgency activities, wherein their lives are placed in danger could be conceived under the rubric of livelihood. Such a conception, and the acts of using such youngsters in counter-insurgency activities, is necessarily revelatory of disrespect for the lives of the tribal youths, and defiling of their human dignity. b

67. It is clear to us, and indeed as asserted by the State of Chhattisgarh, that these tribal youngsters, appointed as SPOs, are being given firearms on the ground that SPOs are treated "legally" as full-fledged members of the police force, and are expected to perform the duties, bear the liabilities, and be subject to the same disciplinary code. These duties and responsibilities includes the duty of putting their lives on the line. Yet, the Union of India, and the State of Chhattisgarh, believe that all that they need to be paid is an "honorarium", and this they claim is a part of their endeavour to promote livelihoods amongst tribal youths, pursuant to Article 21. We simply fail to see how Article 14 is not violated inasmuch as these SPOs are expected to perform all the duties of police officers, be subject to all the liabilities and disciplinary codes, as members of the regular police force, and in fact place their lives on the line, plausibly even to a greater extent than the members of the regular security forces, and yet be paid only an "honorarium". c

68. The appointment of these tribal youngsters as SPOs to engage in counter-insurgency activities is temporary in nature. In fact the appointment for one year, and extendable only in increments of a year at a time, can only be described as of short duration. Under the new rules, freshly minted by the State of Chhattisgarh, they can be dismissed by the Superintendent of Police without giving any reasons whatsoever. The temporary nature of such appointments immediately raises serious concerns. As acknowledged by the State of Chhattisgarh, and the Union of India, the Maoist activities in Chhattisgarh have been going on from 1980s, and it seems to have become more intense over the past one decade. The State of Chhattisgarh also acknowledges that it has to give firearms to these tribal youngsters appointed as SPOs because they face grave danger, to their lives, from the Maoists. In fact, Maoists are said to kill even ordinary civilians after branding them as "police informants". Obviously, in such circumstances, it would only be d

a reasonable to conclude that these tribal youths appointed as SPOs, and known to work as informants about who is a Maoist or a Maoist supporter, spotters, guides and providers of terrain knowledge, would become special targets of the Maoists.

69. The State of Chhattisgarh reveals no ideas as to how it expects these youngsters to protect themselves, or what special protections it offers, after serving as SPOs in the counter-insurgency efforts against the Maoists. Obviously, these youngsters would have to hand back their firearms to the police upon the expiry of their term. This would mean that these youngsters would become sitting ducks, to be picked off by Maoists or whoever may find them inconvenient. The State of Chhattisgarh has also revealed that 1200 of SPOs appointed so far have been dismissed for indiscipline or dereliction of duties. That is an extraordinarily high number, given that the total SPOs appointed in the State of Chhattisgarh until last year were only 3000, and the number now stands at 6500. The fact that such indiscipline, or dereliction of duties, has been the cause for dismissal from service of anywhere from 20% to 40% of the recruits has to be taken as a clear testimony of the fact that the entire selection policies, practices, and in fact the criteria for selection are themselves wrong. The consequence of continuation of such policies would be that an inordinate number of such tribal youths, after becoming marked for death by Maoists/Naxalites the very instant they are appointed as SPOs, would be left out in the lurch, with their lives endangered, after their temporary appointment as SPOs is over.

e 70. The above cannot be treated as idle speculations. The very facts and circumstances revealed by the State of Chhattisgarh leads us to the above as an inescapable conclusion. However, this tragic story does not end here either. It begins to get far worse, because it implicates grave danger to the social fabric in those regions in which these SPOs are engaged to work in anti-Maoist counter-insurgency activities.

f 71. We specifically, and repeatedly, asked the State of Chhattisgarh, and the Union of India as to how, and in what manner they would take back the firearms given to thousands of youngsters. No answer has been given so far. If force is used to collect such firearms back, without those youngsters being given a credible answer with respect to their questions regarding their safety, in terms of their lives, after their appointment ends, it is entirely conceivable that those youngsters refuse to return them. Consequently, we would then have a large number of armed youngsters, running scared for their lives, and in violation of the law. It is entirely conceivable that they would then turn against the State, or at least defend themselves using those firearms, against the security forces themselves; and for their livelihood, and subsistence, they could become roving groups of armed men endangering the society, and the people in those areas, as a third front.

g 72. Given the number of civil society groups, and human rights activists, who have repeatedly been claiming that the appointment of tribal youths as SPOs, sometimes called Koya Commandos, or the Salwa Judum, has led to increasing human rights violations, and further given that NHRC itself has found that many instances of looting, arson, and violence can be attributed to

SPOs and the security forces, we cannot but apprehend that such incidents are on account of the lack of control, and in fact the lack of ability and moral authority to control the activities of SPOs. The appointment of tribal youths as SPOs, who are barely literate, for temporary periods, and armed with firearms, has endangered and will necessarily endanger the human rights of others in the society. a

73. In light of the above, we hold that both Article 21 and Article 14 of the Constitution of India have been violated, and will continue to be violated, by the appointment of tribal youths, with very little education, as SPOs are engaged in counter-insurgency activities. The lack of adequate prior education incapacitates them with respect to acquisition of skills, knowledge and analytical tools to function effectively as SPOs engaged in any manner in counter-insurgency activities against the Maoists. b

74. Article 14 is violated because subjecting such youngsters to the same levels of dangers as members of the regular force who have better educational backgrounds, receive better training, and because of better educational backgrounds possess a better capacity to benefit from training that is appropriate for the duties to be performed in counter-insurgency activities, would be to treat unequals as equals. Moreover, inasmuch as such youngsters, with such low educational qualifications and the consequent scholastic inabilities to benefit from appropriate training, can also not be expected to be effective in engaging in counter-insurgency activities, the policy of employing such youngsters as SPOs engaged in counter-insurgency activities is irrational, arbitrary and capricious. c

75. Article 21 is violated because, notwithstanding the claimed volition on the part of these youngsters to appointment as SPOs engaged in counter-insurgency activities, youngsters with such low educational qualifications cannot be expected to understand the dangers that they are likely to face, the skills needed to face such dangers, and the requirements of the necessary judgment while discharging such responsibilities. Further, because of their low levels of educational achievements, they will also not be in a position to benefit from an appropriately designed training program, that is commensurate with the kinds of duties, liabilities, disciplinary code and dangers that they face, to their lives and health. Consequently, appointing such youngsters as SPOs with duties, that would involve any counter-insurgency activities against the Maoists, even if it were claimed that they have been put through rigorous training, would be to endanger their lives. d

76. This Court has observed in *Olga Tellis v. Bombay Municipal Corpn.*⁸ that: (SCC p. 572, para 32) e

"32. ... 'Life', as observed by Field, J., in *Munn v. Illinois*⁹, means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed." f

⁸ (1985) 3 SCC 515

⁹ 24 LEd 77 : 94 US 113 (1875)

77. Certainly, within the ambit of all those "limits and faculties by which life is enjoyed" also lies respect for dignity of a human being, irrespective of whether he or she is poor, illiterate, less educated, and less capable of exercising proper choice. The State, has been found to have the positive obligation, pursuant to Article 21, to necessarily undertake those steps that would enhance human dignity, and enable the individual to lead a life of at least some dignity. The Preamble of our Constitution affirms as the goal of our nation, the promotion of human dignity. The actions of the State, in appointing barely literate youngsters, as SPOs engaged in counter-insurgency activities, of any kind, against the Maoists, who are incapable, on account of low educational achievements, of learning all the skills, knowledge and analytical tools to perform such a role, and thereby endangering their lives, is necessarily a denigration of their dignity as human beings.

78. To employ such ill-equipped youngsters as SPOs engaged in counter-insurgency activities, including the tasks of identifying Maoists and non-Maoists, and equipping them with firearms, would endanger the lives of others in the society. That would be a violation of Article 21 rights of a vast number of people in the society. That they are paid only an "honorarium", and appointed only for temporary periods, are further violations of Article 14 and Article 21.

79. We have already discussed above, as to how payment of honorarium to these youngsters, even though they are expected to perform all of the duties of regular police officers, and place themselves in dangerous situations, equal to or even worse than what regular police officers face, would be a violation of Article 14. To pay only an honorarium to those youngsters, even though they place themselves in equal danger, and in fact even more, than regular police officers, is to denigrate the value of their lives. It can only be justified by a cynical, and indeed an inhuman attitude, that places little or no value on the lives of such youngsters. Further, given the poverty of those youngsters, and the feelings of rage, and desire for revenge that many suffer from, on account of their previous victimisation, in a brutal social order, to engage them in activities that endanger their lives, and exploit their dehumanised sensibilities, is to violate the dignity of human life, and humanity.

80. It has also been analysed above as to how the temporary nature of employment of these youngsters, as SPOs engaged in counter-insurgency activities of any kind, endangers their lives, subjects them to dangers from Maoists even after they have been disengaged from duties of such appointment, and further places the entire society, and individuals and groups in the society, at risk. They are all clearly violations of Article 21.

81. It is in light of the above, that we proceed to pass appropriate orders. However, there are a few important matters that we necessarily have to address ourselves to at this stage. This necessity arises on account of the fact that the State of Chhattisgarh, and the Union of India, claim that employing such youngsters as SPOs engaged in counter-insurgency activities is vital, and necessary to provide security to the people affected by Maoist violence, and to fight the threat of Maoist extremism.

82. Indeed, we recognise that the State faces many serious problems on account of Maoist/Naxalite violence. Notwithstanding the fact that there may be social and economic circumstances, and certain policies followed by the State itself, leading to emergence of extremist violence, we cannot condone it. The attempt to overthrow the State itself and kill its agents, and perpetrate violence against innocent civilians, is destructive of an ordered life. The State necessarily has the obligation, moral and constitutional, to combat such extremism, and provide security to the people of the country. This, as we explained is a primordial necessity. When the judiciary strikes down State policies, designed to combat terrorism and extremism, we do not seek to interfere in security considerations, for which the expertise and responsibility lie with the executive, directed and controlled by the legislature. The judiciary intervenes in such matters in order to safeguard constitutional values and goals, and fundamental rights such as equality, and right to life. Indeed, such expertise and responsibilities vest in the judiciary.

83. In a recent judgment by a Constitution Bench, *GVK Industries v. ITO*¹⁰ this Court observed: (SCC p. 58, paras 35-36)

"35. Our Constitution charges the various organs of the State with affirmative responsibilities of protecting the interests of, the welfare of and the security of the nation ... powers are granted to enable the accomplishment of the goals of the nation. The powers of judicial review are granted in order to ensure that legislative and executive powers are used within the bounds specified in the Constitution. Consequently, it is imperative that the powers so granted to various organs of the State are not restricted impermissibly by judicial fiat such that it leads to inabilities of the organs of the State in discharging their constitutional responsibilities.

36. Powers that have been granted, and implied by, and borne by the Constitutional text have to be perforce admitted. Nevertheless, the very essence of constitutionalism is also that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution. *Walking on that razor's edge is the duty of the judiciary. Judicial restraint is necessary in dealing with the powers of another coordinate branch of the Government; but restraint cannot imply abdication of the responsibility of walking on that edge.*" (emphasis supplied)

84. As we heard the instant matters, we were acutely aware of the need to walk on that razor's edge. In arriving at the conclusions we have, we were guided by the facts and constitutional values. The primordial value is that it is the responsibility of every organ of the State to function within the four corners of constitutional responsibility. That is the ultimate rule of law.

85. It is true that terrorism and/or extremism plagues many countries, and India, unfortunately and tragically, has been subject to it for many decades. The fight against terrorism and/or extremism cannot be effectuated by constitutional democracies by whatever means that are deemed to be efficient. Efficiency is not the sole arbiter of all values, and goals that

¹⁰ (2011) 4 SCC 36